REPORTS

Of that Learned and Judicious Clerk,

J. Gouldsborough, Esq;

Sometimes one of the Protonotaries of the Court of COMMON-PLEAS.

OR

His Collection of Choice Cases, and matters, agitated in all the Courts at *Westminster*, in the latter years of the Reign of Queen *Elizabeth*.

With Learned arguments at the Bar, and on the Bench, and the grave Resolutions and Judgments, thereupon, of the Chief Justices, *ANDERSON*, and *POPHAM*, and the rest of the Judges of those times.

The Second Edition Corrected and Amended.

With short Notes in the Margent, of the chief matters therein contained, with the Year, Term, and Number Roll, of many of the Cases.

And Two Exact Tables, *viz.* A Briefer, of the Names of the several Cases, with the Nature of the Actions on which they are founded, and a Larger, of all the remarkable things contained in the whole Book.

By W. S. *of the Inner Temple*, Esq;

Ubi est nulla Lex, ibi est nulla transgressio: Sed ubi lex est nullum, ibi abundat Iniquitas.

LONDON,

Printed for *Awnsham Churchill* at the *Black Swan*, at the Lower end of *Paternoster Row* near *Amen-Corner*. 1683.

TO THE

Studious, and Ingenious READER.

TWO things (uſually) make new Books famous; the Name of the Authour, and the Approbation of the Judicious: neither of theſe are here wanting; for thou ſeeſt that this Book (as part of its Title) challengeth the Name of that Learned, and Judicious Clerk, *John Goulds-borough*; A Name ſo well known (even in this our Age) that I ſhould but trifle away time, in multiplying words, to tell thee what he was, and to inlarge upon his worth; and allſo diſcover (too much) mine own weak-

neſs, by endeavouring to prove ſo known a Truth, that it is by all (allready) taken for granted. For the ſecond, I am aſſured, that the Copy hath been communicated to the view of many knowing men in the profeſſion of the Common Law, whoſe unanimous conſent in a fair Teſtimony of the excellency thereof, hath been not only a chief cauſe of the now making it publique, but allſo of heigthning the Publiſhers hopes, that this Book will be peruſed with as much content, and received with as generall an Applauſe, as any thing (of the like nature) that theſe latter yeares have afforded; And that his great care and hazard in this his Edition may receive thy candid conſtruction, and himſelf reap (if not a fruitfull) yet (at leaſt) a ſaving return, for his better encouragement to adventure further (hereafter) in this kind, for thine, and the publique good. For thy further ſatisfaction know, that thou haſt not here a ſpurious deformed Brat, falſly fathered upon the name of a dead man, too

too

too uſuall a trick, played by the ſubtile Gameſters of this Serpentine Age; but thou haſt preſented to thee, though I cannot ſay the Iſſue of the Learned *Gouldsborough*'s own Brain, yet I dare ſay, the Work of his own Hand; and that, which were he living, he would not bluſh to own. A Work, I ſay, not roughly drawn, and caſt by, in neglected Sheets, till time ſhould give leave for the perfecting thereof, but carefully tranſcribed (by himſelf) in a fair Manuſcript, deſtined (as it ſhould ſeem) either for the Preſs and publique view, or to be preſerved as a pretious Jewell, to be (privately) made uſe of in ſucceeding Ages. That this is true, there want not many living Teſtimonies, of perſons of worth, who doe, and have very good reaſon to know his Hand-writing, that, if need required, might be produced, to ſay as much. I ſhall adde but one thing more, and that in brief is this, As the Authour was very careful in Tranſcribing and Correcting

his

his Copy, that he might leave it fair, and entire to Posterity; so hath the Publisher spared neither pains nor cost in the Printing thereof, that the Book may not come foul, and imperfect, to the hands of thee, it's courteous, and ingenious Reader.

W. S.

THE

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De

De Term. Paſch. Anno Elizab. *Reg xxviij.*

1.

WAſt was brought by *Conſtance Foſter*, and another, againſt Leſſee for years, in effect the caſe was ſuch; A man makes a Leaſe of certain Lands, excepting all manner of Woods, the Leſſee cuts down Trees, and he in Reverſion brings an Action of Waſt, and by the opinion of the Court, the Leſſee is not puniſhable in Waſt; for they were never let; and therefore the Plaintif is driven to his Action of Treſpaſs at the Common Law. *Waſt.* 44 *Ed.* 3. 34. *b.* 46 *Ed.* 3. 22. 28 *Hen.* 8. 19. *a.*

2.

THe Sherif returneth in a Writ of Right four Eſquires to make the pannel, and doth not ſay that there be any Knights, it was ſayd by the Court, that he ought to retnrn them which be, and that there be no more. *Return.*

3.

WAſt was brought for digging in Land, and taking away Okes; the Defendant pleaded in bar, That the Queen by her Letters Patents under the Great Seal of *England*, granted unto him, that he might dig for Mines of Cole in the Land, and prayed that it might be entred *verbatim*; and a Grant under the Seal of the Exchequor was entred; whereupon the Plaintif Demurred: Now came *Walmiſley*, and would have amended it, and by the opinion of the Court, he cannot amend it after the Demurrer be entred, but Judgement ſhall be given for the Plaintif, if he ſhew no other matter. *Waſt.* *Demurrer.*

4.

Deviſe and ſale by Executors.

A Man ſeiſed of Lands in Fee, Deviſeth to his Wife for life; the Remainder to his Son in tayl, and if his Son dye without iſſue of his body, that then the Land ſhall be ſold by his Executors, and maketh two Executors, and dyeth; the Wife dyeth; one Executor dyeth; the Sonne dyeth without iſſue; the other Executor ſelleth the Land; and *Gawdy* the Queens Serjeant moved whether the ſale be good or no, and it ſeemeth to him that the ſale is good, and vouched the Caſe in 30 *Hen.* 8. *Brook*, Deviſe 31. And now lately, it was adjudged in the Kings-bench, where a man did Deviſe his Lands in tayl, and for default of ſuch iſſue, that the Land ſhall be ſold by his Sonnes-in-law, and dieth, having five Sonnes-in-law; the one dyed, the others ſold the Land, and this was adjudged a good ſale. *Anderſon*] It ſeemeth the ſale is not good; for if one make a Letter of Attorney to two to make Livery and Seiſin, if the one dye, the other cannot doe it: So if one grant the Office of Stewardſhip to two, the one of them cannot hold Court alone: And if one of them may ſell, to what intent was the Statute of 21 *Hen.* 8. cap. 4. that thoſe which take the Adminiſtration may ſell? *Windham*] The Statute will not prove the caſe, but it ſeemeth the ſale to be naught; And there is a difference where one giveth an intereſt to two, and when he giveth but an authority; for an intereſt may ſurvive, but an authority cannot. *Rodes* to the ſame intent, and cited M. 4 & 5 *Eliz.* fol. 219. *a.* & 177. & 210. & 371.

Livery.

Stewardſhip.

Intereſt.
Authority.

5.

Battery.

11 H. 4. f. 3.
11 H. 4. f. 61.
22 H. 6. f. 33.
21 H. 6. f. 9.
9 E. 4. f. 46.
43 E. 3. 23.

BAttery, by *Webſter* againſt *Pain*, the Action was layd in *London*, and in truth the Battery was committed at *Uxbridge* in *Midleſex*, ~~the Defendant pleaded that ſuch a day and year at *A.* in the County~~ of *Huntington*, the Plaintif made an aſſault upon him, and the hurt &c. *abſq; hoc*, that he is guilty in *London*. *Snag* moved that the Traverſe ſhould not be good. *Anderſon*] Will you have him to ſay, *abſq; hoc*, that he is guilty? that he ought not; for by the ſpeciall matter he hath confeſſed the Battery, and you will not deny, but that if his Plea be true, he hath good cauſe to bar the Plaintif; wherefore if we ſhall not allow this Plea, we ſhall take the Defendant from his remedy to plead, which God forbid: And in 2 *Ed.* 4. fol. 6. *b.* In Treſpaſs the Defendant ſhewed ſpeciall matter in *London*, where the Action was brought in *Midleſex*. *Tota Curia*, *Nelſon* Prothonotarie hath ſhewed a preſident in 2 *Ed.* 4. where ſuch a Plea as this was pleaded, wherefore the Plea is good.

4. *Nelſon*,

6.

Treſpaſs.

Unity of poſſeſſion of Common.

Nelſon, Prothonotary, brought a Writ of Treſpaſs againſt another, in effect the caſe was thus; The Abbot of *Weſtminſter* was ſeiſed of Lands, to which he had common in the Lands of a Prior; afterwards, by the Statute of Diſſolutions, as well the Lands of the Abbot, as of the Prior, were given to King *Hen.* 8. And after that, the Dean of *Weſtminſter* had a grant of the Mannor which the Abbot had, and *Nelſon* had the other Mannor which the Prior had, into which a Tenant of the Deans put his beaſts, claiming Common, as once it was in the hands of the Prior, and *Nelſon* brought his Action of Treſpaſs. *Walmiſley* moved that the Tenant ſhould have his Common. *Peryam*] Is this a new caſe? It hath been adjudged heretofore, that by the union of poſſeſſion the Common is gone. *Anderſon* to *Walmiſley*] Have you any reaſon why the Common ſhall not be gone? *Walmiſley*] No, my Lord, if the Statute will not help us; for the Statute is, that the King ſhall have it in the ſame plight as the Abbot had it, and the Abbot had Common, *ergo*, *&c. Windam*] So is the Statute, but the Statute doth not ſay, that it ſhall continue ſo in the hands of the King, and it is impoſſible that it ſhall continue in the hands of the King as it was in the hands of the Abbot, therefore the Common is gone. *Rodes* aſſented.

11 H. 4. 5.
14 H. 4.
24 E. 3. 25.
Br. Extinguiſhment 14 *Aſſ.* pl. 20.

7.

Quare impedit.

Moor brought a *Quare impedit*, & after Judgment had a Writ to the Biſhop of *Norwich*, and at the *alias* the Biſhop returned, that after the awarding of the firſt Writ, and before the receipt of the ſecond, the Queen had preſented the ſame Defendant by her Letters Patents, who is admitted, inſtituted, and inducted, ſo that, *&c. Shuttleworth* moved that the Ordinary might be amerced for his evill Return; for when he had Judgement to Recover, he ought to have the effect of his Judgement; for elſe it ſhall be in vain to ſue a *Quare impedit*, and thereupon he avouched the caſe in 21 *Hen.* 7. 8. & 21 *Eliz.* 364. *Dyer*, that the other Clerk ſhall be removed. *Anderſon*] the Return is not good; for me ſeemeth in a *Quare impedit*, when one which hath title Paramount preſents, hanging the Writ, then allthough the Plaintif hath Judgement to Recover, yet his Clerk ſhall not be removed; but if it be under, or after the title of the Plaintif or Defendant, then his Clerk ſhall be removed; and here he hath returned, that the Queen hath preſented the ſame man which is Defendant, and therefore he ſhall be amerced *Windham* to the ſame intent, and cited the caſe of *Long*, 5 *Edw.* 4. fol. 115. *b. Rodes* cited the caſe in

Title Paramount en qu. imp.

 Fitzherbert

Fitzherbert, *Quare non admisit*, fol. 47. *k.* and *Bassets* case in 9 *Eliz. Dyer*, fol. 260. *Anderson*] In a *Præcipe quod reddat*, if the Sherif return upon the *habere facias seisinam*, that another hath recovered by title Paramount against the Defendant, and hath execution, he shall be amerced. *Peryam*] How doth it appear to us, that he which the Queen hath presented, is the same Defendant? *Shuttleworth*] By the Return. *Peryam*] No, Sir; and therefore it is good to be advised: And after *Windham* doubted for the same cause. *Et adjornatur.*

Alit. en pr. quod reddat.

Q.

Dower.

TRistram *Ayscough*, and *Eulaleia* his Wife brought a Writ of Dower of the endowment of her first Husband; the Defendant pleaded in bar, that an Annuitie was granted to her first Husband and her self, in recompense of her Dower, which she after his death accepted; and the Plaintif replyed, *quod recusavit prædict. annuitatem*, after the death of her husband. *Gawdy*] The Plea is nor good. *Anderson*] Your intent is, for that she disagreed in the Country, and not in a Court of Record, that the disagreement shall not be good; but I think not so: for if she say in the Country, that she will not have the sayd Annuity, this is a good refusall; and if she once disagree, she can never agree afterwards (*quod tota Curia concessit*) but peradventure *recusavit* is no good pleading.

Disagreement in pais.

9.

Quid juris clamat.

FRancis *Windham*, one of the Justices of the Common Pleas, brought a *Quid juris clamat* against the Lady *Gresham*, to have Attornment of certain lands comprised within the note of a Fine levied to him by one *R. Read*: The Lady pleaded, that certain persons were seised of those Lands, and held them of King *Hen.* 8. by Knights service, and enfeoffed *W. Read*, and the Lady then his Wie, to have and to hold to them and the heirs of the husband, who devised the reversion after the death of the Lady to the sayd *R. Read* in tayl, the remainder, *&c.* and that the said *R. Read* levyed the Fine, *&c.* whereupon *Windham* demurred in Law. *Gawdy*] The Plea is not good for divers causes; the one is for the pretence of the Tenant, for that the Lands were held by Knights service, the Devise is voyd for the third part, so that therein the Conisor hath nothing, but she doth not shew who had the reversion of the third part, which she ought to shew, and thereupon he vouched 30 *Ed.* 3. fol. 7. & 34 *Ed.* 3. *quid juris clamat.* The Defendant said that he held not of the Conisor, he ought to shew who had the inheritance; and 30 *Hen.* 6. fol. 8. in Wast brought by *Radford*. Another cause is, for that in the end of her Plea she

14 E. 3. Fitzh. *Quid juris cl.*

ſhe demandeth Judgement, *ſi pro eiſdem duabus partibus*, ſhe ought to Attorn, and ſhe doth not ſpeak of any two parts before, and therefore it is not good, and vouched 7 *Ed.* 6. in the Comentaries, Parliament held *prædict.* 28 *Ap.* & 9 *Edw.* 4. *bona prædict.* J. S. and doth not ſpeak of any J.S. before. Then for the matter in Law, for that the Coniſor was but Tenant in tayl, this notwithſtanding it ſeemeth ſhe ought to Attorn, and therupon he cited the caſe in 48 *E.* 3. fol. 23. *in per quæ ſervicia*, & 24 *E.* 3. Tenant in tayl of a reverſion of a Mannor levies a Fine, the Tenant for life ought to Attorn. And 3 *Ed.* 3. *quid juris*, *&c.* It is there ruled, that Tenant for life ſhall Attorn upon a Fine levied by Tenant in tayl; and therefore ſhe, *&c.* And by the opinion of the Court, the exception, *ſi pro eiſdem duabus partibus* made the Plea evill without queſtion, and therefore gave judgement for *Windham*, that he ſhould have Attornment, but they ſaid nothing to the other points. *Eijaem.*

10.

Huttelworth came to the Bar, and ſhewed how an Ejection firm was brought of an entry into certain Lands, the Defendant pleaded not guilty, and thereupon the Jury found, that he entred into one moity, and not into the other; and this he alleged in Arreſt of Judgement. *Anderſon*] It ſeemeth that Judgement ſhall not be given; for this is an Action perſonall, and is not like to a *Præcipe quod reddat*. *Rodes*] It ſeemeth the contrary by 21 *Edw.* 4. fol. 16. *b.* & fol. 22. ſee there the caſe intended. *Anderſon*] The caſes are not alike. *Verdict.*

11.

IN the Exchequor Chamber before all the Juſtices, *&c.* the caſe was ſuch, *John Capell* gave the Mannor of *How-Capell*, and *Kings-Capell* in the County of *Hereford*, to *Hugh Capell* in tayl, the remainder to *Rich. Capell* in tayl, with divers remainders over; the Donor dieth, *Hugh* hath iſſue, *William*, and dieth, *Richard* grants a rent charge of fifty pound to *Antony* his ſon; *William* ſelleth the Land to *Hunt* by fine and recovery with Voucher, and dieth without iſſue, *Antony* diſtreineth for Arrearages, and the Tenant of *Hunt* brings a Replevin, and *A.* avows the taking, whereupon the Plaintif demurs in Law. *Fenner*] It ſeemeth that the Avowant ſhall have Return; and firſt I will not ſpeak much to that which hath been agreed here before you, that a Remainder may be charged well enough; for by the Statute the Remainder is lawfully inveſted in *Richard*; and I agree well that no Formdone in a Remainder was at the Common Law, and ſo are

our Bookes, in 8 *Ed.* 2. and *Fitzh.* in his *Nat. brev.* ſaith, that it is given by the equity of the Statute. At the Common Law there was no Formdone in diſcender, now it is given by the Statute of *Weſtminſter* 2 cap. 1. For in *novo caſu erit novum remedium apponendum.* And I have taken it for Law, that when a thing is once lawfully veſted in a man, it ſhall never be deveſted without a lawfull Recovery; and here the Recovery doth not touch the Rent; and I think that allthough the Remainder was never executed in poſſeſſion, yet the Grantee of the Rent ſhall confeſs and avoyd it well enough. The Fine is not pleaded here with proclamation, and therefore it is but a bare diſcontinuance, in proof whereof is the caſe in 4 of *Ed.* 3. Tenant in tayl makes a diſcontinuance, yet he in Reverſion may diſtrein for his ſervice. And if there be Tenant for life, the Reverſion to a ſtranger, and he in Reverſion grant a Rent charge, Tenant for life is diſſeiſed and dye, the Grantee of the Rent ſhall diſtrein, allthough that he in Reverſion will never enter: And ſo if Tenant in tayl, the Remainder to the right heirs of *I.S.* make a Feoffment in Fee upon the death of the Tenant in tayl without iſſue, the right heir of *I.S.* ſhall enter well enough: And he put *Pleſingtons* caſe in 6 *R.* 2. *Fitzh. quod juris clamat* 20. & 8 *R.* 2. *Fitzh.* Annuity 53. And the caſe in *Littleton*, & *Dyer* fol. 69. *a.* pl. 2. & 22 *Ed.* 3. fol. 19. One grant a Rent charge to another upon condition that if he dye his heir within age, that the Rent ſhall ceaſe during the minority, yet his Wife ſhall recover her Dower when the heir cometh to full age, *Perk.* 327 Which caſes prove, that allthough the eſtate wherupon the grant is be in ſuſpence when the grant ought to take effect, yet the grant ſhall take effect well enough; and if Tenant in tayl, and he in remainder had joyned, this had been good clearly. And 8 *Ed.* 3. & 43 *Ed.* 3. Tenant in tayl to hold without ſervice, the remainder to another to hold by ſervice, if Tenant in tayl in this caſe had ſuffered a Recovery, and dyed without iſſue, I think the Lord (in this caſe) ſhall diſtrein for the ſervice, then I ſuppoſe that the fine in the principall caſe ſhall not exclude the Grantee from his rent; for there is a difference between *jus in terra*, and *jus ad terram*; for I think that no fine ſhall defeat *jus in terra*, and 26 *H.* 8 fol. 3. *a. b.* if I grant you *proximum advocationem*, and after ſuffer the Advowſon to be recovered, the Grantee ſhall falſifie in a *Quare impedit*, Then whether this recovery ſhall avoyd the rent or no, and I think no; for this caſe differs, and now the recovery is had againſt Tenant in tayl, for the remainder here is out of him by the fine, and in the Conuſee, and the recovery doth not diſprove the intereſt before, for 8 *Hen.* 4. fol. 12. recovery againſt Tenant in tayl who dieth before execution ſued: And 44 *Ed.* 3. recovery of the rent is not a recovery of the homage, unleſs it be by title: And here there is not any recompenſe to him in the remainder

Lawful veſture.

Diſtreſs per grantee, before entrie of the grantor.

Droit heir de I.S.

Rent ch. ſur. cond. Dower.

Jus in terra. Prox. advoc.

Rent & homage.

der, and therefore there will be a difference in this caſe, and where there is a recompenſe, fol. 7. *Hen.* 6. if a perſon grant an Annnity for Tithes, it is good, but if there be a *nomine pœnæ*, it is not good; and 7 *lib. Aſſ.* an Annuity granted untill he be promoted to a benefice, it ought to be of as great value as the Annnity, and 26 *Edw.* 3. the Church ought not to be ligitious; and 22 *Ed.* 3. two men ſeiſed in Fee-ſimple exchange for their lives, *&c.* and 14 *Hen.* 4. the King may grant a thing which may charge his people without, *&c.* And 44 *Ed.* 3. rent granted for a releaſe by Tenant in tayl, is good, and ſhall bind and charge his iſſue. And ſo he ſeemeth that the Avowant ſhall have return. *Walmiſley* to the contrary; For firſt it hath been held, that the charge at the beginning is good, and ſo I hold the Law, but how, or in what manner, that is the queſtion. 38 *Ed.* 3. If Tenant for life be, and he in reverſion grant a rent charge, it is good; but it ſhall be *quando acciderit.* 33 *lib. Aſſ.* & 5 *Ed.* 4. fol. 2. *b.* But this caſe is out of the Books remembred; for there the remainder *nunquam accidit*, and therefore ſhall never be charged; for as I hold when he in remainder chargeth, he chargeth his future poſſeſſion, and not his preſent intereſt; for if a *Sci. fa.* ſhould iſſue to execute this remainder, he ſhall demand the Land, and before the remainder falleth he hath but *quaſi jus*, which is not corporall, neither ought it to be put in view in Aſſiſe; and 21 *Hen.* 6. *a.* Tenant of the Land ſhall Attorn upon the grant of a rent charge; and 33 *Ed.* 3. Priority ſhall hold place when the remainder falleth, and not when it is granted, 17 *Ed.* 2. and *Dyer Tr.* 23 *Eliz. pl.* 1. Then, Sir, when the foundation out of which the rent is iſſuing is gone, the rent is allſo gone; and therefore let us ſee what authority Tenant in tayl hath in the remainder. At the Common Law, there was no Formdone in deſcender or remainder; and the Statute of *W.* 2. *cap.* 1. provides but for two perſons, *viz.* he in reverſion and the iſſues; but Formdone in remainder is taken by the equity. 50 *Ed.* 3. If Tenant for life be, the remainder in tayl to another, the remainder in fee to the Tenant for life, and he makes waſt, Tenant in remainder ſhall puniſh him: and *Fitzh. nat. br.* fol. 193. *a. Cui in vita*, by a wife which was Tenant in tayl upon the alienation of her husband: And I think that if he in remainder bargain his remainder that it is voyd, and he cannot grant to another that he ſhall dig in the ſoyl, for by 2 *Hen.* 7. he in reverſion cannot doe ſo. 12 *Ed.* 4. Recovery ſuffered ſhall bind the iſſue. 7 *Ed.* 3. no attaint lieth for him in remainder of a verdict given againſt Tenant for life, then in this caſe he in remainder cannot enter, and the Grantee ſhall not be in a better eſtate than his Grantor, and then if he ſhall never enter, *fruſtra eſt illa potentia quæ nunquam reducitur in actum.* The reaſon for the grant is good; for when Tenant in tayl dyeth without iſſue, he in remainder ſhall be in by the firſt gift in,

Annuity for Tithes. *Nomine pœnæ.* *Promotion to a benefice.* *Rent for a releaſe.* *Charge continuant.* *Sci fa. de rem.* *View.* *Attornment al rent ch.* *Priority.* *Waſt.* *Bargain de remain.* *Nul attaint pur tenant in rem.*

Ward. in proof whereof is 33 *Hen.*6. he in remainder ſhall be in ward; and in 11 *Hen.*4. in Formdone in deſcender, he ſhall ſay that the poſſeſſion was given to his father. And a Prebendary cannot charge before induction. But if two Jointenants be, and the one charge all, and the other diſclaimeth, the charge is good from the beginning: And the Recoverer here is not under the charge; for allthough he hath that eſtate which he in remainder ſhould have if Tenant in tayl had not aliened, yet is he a meer ſtranger, and in by another title, 10 *Ed.* 3. If two Jointenants be, and the one charge, this is good, conditionally that he which chargeth ſhall ſurvive. And if Tenant *pur auter vie* charge and die, *occupans* ſhall hold it diſcharged: So in this caſe; for he is not in of this poſſeſſion. Moreover, there is a miſchief if this charge be good; for then the Land may be charged by two ſeverall perſons at once, which ſhall not be ſuffered; but yet if *ceſtui que uſe* charge, and the Feoffees charge, both are good, for the one is by the Common Law, 28 *Ed.*3. 10. *b.* and the other by the Statute Law. So if Leſſee for years charge, and he in reverſion charge, and after Leſſee for years ſurrender; but this is in ſeverall reſpects, and I put this caſe for Law, that if he in the remainder bind himſelf in a Statute Merchant, this ſhall not charge the poſſeſſion. And if in this caſe he will grant the rent over, none ought to Attorn, and therefore voyd; and *Littleton* ſaith, that he in remainder ſhall not falſifie; and 26 *Hen.* 8. the Grantee of leſſee for years ſhall not falſifie; for the nature of falſifying is properly to find a fault, wherefore it ſhould not be good; and what fault can he find in this caſe? ſurely none. 4 *Hen.* 7. 1. *a.* & 20 *Hen.* 6. Abbot confeſſeth an Action, the Succeſſor is bound: And further, it is within the Statute of 27 *El.* for fraudulent deeds; and we need not to plead the covin; for the Statute is generall, and vouched *Wimbiſh* caſe in the Comentaries, and ſo the Replevin is maintainable. And after at the motion of the Juſtices the Defendant agreed that the Plaintif ſhould amend his Plea, and allege the Covin. *Et adjornatur* untill *Michaelmas* Term following, becauſe there were ſo many Demurrers hanging to be argued in *Trinity* Termnext. But afterwards judgement was given againſt the Rent charge.

Formdone. Prebendary. Ioyntenants.

Charge per Ioyntenant.

Charge per ceſt. que uſe & Feoffees.

Ch. per leſſee, & per en reverſion.

Stat. Merch. per ceſt. en rem. ne charge le poſſ.

No attornment.

Falſifying.

Succeſſor lie per confeſſion.

Fraudulent faits.

Treſpaſs.

12.

KIng *Hen.*8. gave certain lands to Sir *Edward Bainton*, Knight, and to the heirs males of his body engendred, who had iſſue *Andrew* and *Edward*, and dyed. *Andrew* afterwards covenanted with the Lord Admirall *Thomas Seymer*, that he would convey an Eſtate of thoſe Lands to himſelf for life, the remainder to the Lord *Seymer* in Fee; and in like manner the Lord *Seymer* covenanted to convey an Eſtate

Eſtate of other Lands to himſelf for life, the remainder to *Andrew Bainton* in Fee. Afterwards *Andrew Bainton* levyed a Fine, and executed the eſtate according to the covenant on his part. Afterwards the Lord *Seymer*, before performance of the covenant on his part, was attainted of High Treaſon, and all his Lands forfeited to King *Edward* the ſixth, who dyed without iſſue, and the Lands deſcended to Queen *Mary*, to whom *Andrew Bainton* ſued by Petition, and ſhewed how ſhe had thoſe Lands to the diſinheriſon of him and his heirs: and Queen *Mary*, by her Letters Patents, *ex certa ſcientia, & ex mero motu, &c.* granted to *Bainton* all thoſe Lands and Tenements which he had covenanted to convey to the Lord *Seymer*, and all reverſions thereof, in as ample manner as ſhe had them; *Et ulterius ex uberiori gratia ſua* ſhe granted all reverſions, claims, and demands, *qua ad manus ſuas devenerunt ratione, &c. aut in manibus ſuis exiſtunt, aut exiſtere deberent.* Afterwards *Andrew Bainton* levyed a Fine of thoſe Lands to one *Segar* in Fee, and dyed without iſſue; then *Edward Bainton* entred, and *Segar* brought his Action of Trepaſs.

Puckering] It ſeemeth that the entry of *Edward Bainton* is congeable, and ſo the Action not maintainable. Firſt let us ſee what paſſeth by this Grant of Queen *Mary* to *Andrew Bainton*; and then whether a Fine levyed by Tenant in tayl, the reverſion being in the Queen, be a bar to the tayl by the Statute of 4 *Hen.*7. The firſt Fine as it is pleaded is not pleaded with proclamations, and therefore but a diſcontinuance, and remains but as at the Common Law. At the Common Law before the Statute of *Donis conditionalibus*, a Fine levyed was a bar to all men; for all Inheritances were Fee ſimples, then by that Statute it was ordained, *Quod neq; per factum, neq; foeſamentum*, of the Tenant in tayl, the iſſue ſhould be barred. After which Statute, as I intend, the Law was ſuch, that when Tenant in tayl levied a Fine of ſuch a thing as he might diſcontinue, and the Fine executed in poſſeſſion, allthough the words of the Statute were *Ipſo jure ſit nullus*, yet the iſſue was put to his Formdone; but if it were a Fine Executory, then by the death of the Tenant in tayl the iſſue was remitted, and the Fine voyd: But now by the Statute of 4 *Hen.* 7. the Law is made otherwiſe; and for that here it is to be granted, that he cannot diſcontinue the eſtate tayl, becauſe the reverſion is in the King, as it was now lately adjudged in the Exchequer in the caſe of *Gilebrand*, *ergo*, here the eſtate doth not paſs to the Feoffees by the firſt Fine, when he took an eſtate again to himſelf for life, the remainder to the Lord *Seymer* in Fee, but a Fee ſimple determinable, then when the Lotd *Seymer* was attainted, Queen *Mary* had ſuch an eſtate as the Lord *Seymer* had, which was a Fee determinable, and ſhe had another Fee abſolute in *jure Coronæ*: After when he ſued by Pe-

 tition

tition he did not ſhew to the Queen what eſtate he had, nor what eſtate the Queen had, but that it was to the diſinheriſion of him and his heirs; then the Queen grants *reverſionem inde adeo plene libere & integre* as ſhe had it, or as it came to her by the Act of Parliament. And I think when the Queen gives by generall words, ſhe doth not give any ſpecial Prerogative: And for that 8 *Hen.* 4. fol. 2. A grant to the Biſhop of *London* to have *catalla, &c.* and 9 *Eliz.* 268. in *Dyer*, the caſe of the Dutchy of *Cornwall*, & 8 *Hen.* 6. the King pardons all Felonies, this is no pardon of the Outlawry, and eſpecially when the Queen hath two intereſts it ſhall be conſtrued beneficially for the Queen, as 9 *Edw.* 4. Grant of an Office where the Grantee was no deniſon, ſee there *Baggots* Aſſiſe, and 38 *Hen.* 6. the King grants Land to *J. S.* for the life of himſelf and *J. D.* and after grants the reverſion upon the life of one of them. And further the caſe in *Dyer*, where Queen *Mary* grants in *Manerium de Bedminſter in Com. Somerſet*, 5. 13 *El.* fol. 306 *a.* Then, Sir, the Patent is, that the Queen *intendens dare congruum remedium in premiſſis, &c.* and when he ſueth to the Queen by Petition, all tirles ought to be in the Petition. 3 *Hen.* 7. & 1 *H.* 7. a Latin caſe, the caſe of the corody, and this is in nature of a Petition, & therfore ought to be certain, then the Patent is, *Et ulterius ex uberiori gratia ſua conceſſit omnes reverſiones que ad manus ſuas devenerunt ratione actus Parliamenti, &c. aut in manibus ſuis exiſtunt, vel exiſtere deberent, &c.* and they are not to be expounded ſo largely, as to make the reverſion to paſs; for if thoſe words, *ratione, &c.* were before *ad manus ſuas, &c.* or after *in manibus ſuis exiſtunt*, then it cannot be intended but the reverſion ſhall not paſs to *Bainton*. Now when *in manibus ſuis exiſtunt* come after theſe words, *ratione, &c.* for references are to be intended according to the meaning of the parties, 29 *lib. Aſſ.* & 14 *Eliz. Dyer*. Deviſe of all Acres, except a Leaſe for 30 years: And thoſe words, *aut exiſtere deberent*, ought to have ſome relation, *ergo*, it ought to be intended, *que in manibus ſuis exiſtunt ratione attinctura, &c.* and this will not make any grant of the reverſion. For the meaning of the Queen was, becauſe *Bainton* had no recompenſe of the other Lands, to give him theſe, for no uſe was in him by the covenant of *Seymer*, as it is agreed 1 *Maria* fol. 96. ſo nothing paſſed but that which was in the Queen by reaſon of the atteynder of *Seymer*. For the other matters; I think that *A. Baynton* is not Tenant in tayl by the grant again; but admit him ſo, yet he cannot diſcontinue, neither is he bound by the Statute of 4 *Hen.* 7. for the Statute doth not extend but to ſuch things which are touched by the Fine, & things which are not touched doe not paſs, as Commons, Rents, Wayes, *&c.* *Br. Fines*, 123. 30 *Hen.* 8. fol. 32. And it hath been adjudged in *Sanders* caſe, 21 *Eliz.* that Leſſee for yeares need not to make claim within five years, and vouched the opinion of *Br. tit. Fines*

Petition certain.

References. Deviſe.

No uſe.

Claim per leſſee pur. ans. alit. poſtea ſi ſoit en pays.

Fines 12 1. accordingly, that the iſſue ſhall not be barred. And as the King is privileged, ſo are his poſſeſſions, allthough that afterwards they come into a ſubjects hands. And where one hath a ſpecial Grant allthough a general Reſtraint come after, if he doe not ſpeak ſpecially of this, the Grant ſhall be good in many caſes, as 19 *Hen.* 6. fol. 62. the Parſon of *Edingtons* caſe, *Br. Patents* 16. and the caſe of the Abbot of *Waltham*, 21 *Ed.* 4. fol. 44. *Br. tit. Exemption* 9. & in 19 *Hen.* 8. it was doubted if the iſſue of a common perſon ſhould be barred, *ergo*, the iſſue in tayl, the reverſion being in the King, is not barred. And the Statute of 32 *Hen.* 8. is generall, as well for thoſe which were of the gift of the King, as others; and therefore afterwards there was another Statute made, which excepted thoſe which were of the gift of the King, as it was before the Statute of 32 *H.* 8. and it was a vain thing to make this Statute of Exception, if it were a bar before by the Statute of 4 *H.* 7. And for authority I have a report delivered me by a Sage antient in the Law, that in 16 & 17 *El.* in *Jacksons* caſe, where Lands were given in tayl, the remainder to the King in fee, the Tenant in tayl levyed a fine after the Statute of 32 *H.* 8. by the opinion of the Court, this was a bar, but the Court then ſayd, that otherwiſe it ſhould be if the reverſion were in the King, as our caſe is, wherfore ſeeing there is neither diſcontinuance, nor bar in the caſe his entry is congeable, and the Action not maintainable. *Walmiſley* to the contrary; I will agree that it is not any diſcontinuance, yet he may admit him out of poſſeſſion if he will, as in 18 *Edw.* 3. Where Tenant in tail, the Reverſion in the King, makes a Leaſe for life, and hath two Daughters and died, and Leſſee for life was impleaded, and upon his default the two daughters prayed to be received, and ſo they were; and as me ſeemeth the Petition made by him to the Queen, ſhall not prejudice or hinder the Grant, *ex mero motu*, and vouched 3 *H.* 7. fol. 6. the Priors caſe. Note that *Puckering* then ſaid privily to *Shuttelworth*, is not the book contrary to that which he hath vouched? for he vouched the Book contrary to that which *Puckering* had done before. *Shuttelworth*] No, Sir, but the record is contrary to the Book, *quod nota*, and when ſhe granteth *ex certa ſcientia*, it ſhall be taken beneficial for the party, 1 *H.* 7. 13. *omnia debita* releaſed to the Sherif, and 29 *Ed.* 3. the King ſeiſed the lands of a Prior alien, *&c.* and there is a difference between the caſes put, and this caſe; for when the Queen makes a Grant, all matters of intereſts may paſs by the words, but matters of prerogative, as in the caſes put by my brother *Puckering* cannot paſs, for they are not within the words, but intereſts are. To that which hath been ſayd, that he was not ſeiſed of any eſtate tayl, this is not any argument; for if he had three rights, by the Fine all are gone and paſſed to the Conſee; for if he be diſſeiſed, or diſcontinue, and then levy a Fine, this is a bar, [illegible]

Generall reſtraint.

Difference per enter rem. & reverſion in le Roy.

Difference per enter intereſt & prerogative.

Touts droits paſſ per fine. Fine paſs diſſeiſon in tail.

tition he did not ſhew to the Queen what eſtate he had, nor what eſtate the Queen had, but that it was to the diſinheriſion of him and his heirs; then the Queen grants *reverſionem inde adeo plene libere & integre* as ſhe had it, or as it came to her by the Act of Parliament. And I think when the Queen gives by generall words, ſhe doth not give any ſpecial Prerogative: And for that 8 *Hen.* 4. fol. 2. A grant to the Biſhop of *London* to have *catalla, &c.* and 9 *Eliz.* 268. in *Dyer*, the caſe of the Dutchy of *Cornwall*, & 8 *Hen.* 6. the King pardons all Felonies, this is no pardon of the Outlawry, and eſpecially when the Queen hath two intereſts it ſhall be conſtrued beneficially for the Queen, as 9 *Edw.* 4. Grant of an Office where the Grantee was no deniſon, ſee there *Baggots* Aſſiſe, and 38 *Hen.* 6. the King grants Land to *J. S.* for the life of himſelf and *J. D.* and after grants the reverſion upon the life of one of them. And further the caſe in *Dyer*, where Queen *Mary* grants in *Manerium de Bedminſter in Com. Somerſet*, 5. 13 *El.* fol. 306 *a.* Then, Sir, the Patent is, that the Queen *intendens dare congruum remedium in præmiſſis, &c.* and when he ſueth to the Queen by Petition, all titles ought to be in the Petition. 3 *Hen.* 7. & 1 *H.* 7. a Latin caſe, the caſe of the corody, and this is in nature of a Petition, & therfore ought to be certain, then the Patent is, *Et ulterius ex uberiori gratia ſua conceſſit omnes reverſiones quæ ad manus ſuas devenerunt ratione actus Parliamenti, &c. aut in manibus ſuis exiſtunt, vel exiſtere deberent, &c.* and they are not to be expounded ſo largely, as to make the reverſion to paſs; for if thoſe words, *ratione, &c.* were before *ad manus ſuas, &c.* or after *in manibus ſuis exiſtunt*, then it cannot be intended but the reverſion ſhall not paſs to *Bainton*. Now when *in manibus ſuis exiſtunt* come after theſe words, *ratione, &c.* for references are to be intended according to the meaning of the parties, 29 *lib. Aſſ.* & 14 *Eliz. Dyer*. Deviſe of all Acres, except a Leaſe for 30 years: And thoſe words, *aut exiſtere deberent*, ought to have ſome relation, *ergo*, it ought to be intended, *quæ in manibus ſuis exiſtunt ratione attinctu-ræ, &c.* and this will not make any grant of the reverſion. For the meaning of the Queen was, becauſe *Bainton* had no recompenſe of the other Lands, to give him theſe, for no uſe was in him by the covenant of *Seymer*, as it is agreed 1 *Mariæ* fol. 96. ſo nothing paſſed but that which was in the Queen by reaſon of the atteynder of *Seymer*. For the other matters; I think that *A. Baynton* is not Tenant in tayl by the grant again; but admit him ſo, yet he cannot diſcontinue, neither is he bound by the Statute of 4 *Hen.* 7. for the Statute doth not extend but to ſuch things which are touched by the Fine, & things which are not touched doe not paſs, as Commons, Rents, Wayes, *&c. Br. Fines*, 123. 30 *Hen.* 8. fol. 32. And it hath been adjudged in *Sanders* caſe, 21 *Eliz.* that Leſſee for yeares need not to make claim within five years, and vouched the opinion of *Br. tit.*

Petition certain.

References. Deviſe.

No uſe.

Claim per leſſee pur. ans. alit. Poſtea ſi ſoit en paſs.

Fines

Fines 121. accordingly, that the issue shall not be barred. And as the King is privileged, so are his possessions, allthough that afterwards they come into a subjects hands. And where one hath a special Grant allthough a general Restraint come after, if he doe not speak specially of this, the Grant shall be good in many cases, as 19 *Hen.* 6. fol. 62. the Parson of *Edingtons* case, *Br. Patents* 16. and the case of the Abbot of *Waltham*, 21 *Ed.* 4. fol. 44. *Br. tit. Exemption* 9. & in 19 *Hen.* 8. it was doubted if the issue of a common person should be barred, *ergo*, the issue in tayl, the reversion being in the King, is not barred. And the Statute of 32 *Hen.* 8. is generall, as well for those which were of the gift of the King, as others; and therefore afterwards there was another Statute made, which excepted those which were of the gift of the King, as it was before the Statute of 32 *H.* 8. and it was a vain thing to make this Statute of Exception, if it were a bar before by the Statute of 4 *H.* 7. And for authority I have a report delivered me by a Sage antient in the Law, that in 16 & 17 *El.* in *Jacksons* case, where Lands were given in tayl, the remainder to the King in fee, the Tenant in tayl levyed a fine after the Statute of 32 *H.* 8. by the opinion of the Court, this was a bar, but the Court then sayd, that otherwise it should be if the reversion were in the King, as our case is, wherfore seeing there is neither discontinuance, nor bar in the case his entry is congeable, and the Action not maintainable. *Walmisley* to the contrary; I will agree that it is not any discontinuance, yet he may admit him out of possession if he will, as in 18 *Edw.* 3. Where Tenant in tail, the Reversion in the King, makes a Lease for life, and hath two Daughters and died, and Lessee for life was impleaded, and upon his default the two daughters prayed to be received, and so they were; and as me seemeth the Petition made by him to the Queen, shall not prejudice or hinder the Grant, *ex mero motu*, and vouched 3 *H.* 7. fol. 6. the Priors case. Note that *Puckering* then said privily to *Shuttelworth*, is not the book contrary to that which he hath vouched? for he vouched the Book contrary to that which *Puckering* had done before. *Shuttelworth*] No, Sir, but the record is contrary to the Book, *quod nota*, and when she granteth *ex certa scientia*, it shall be taken beneficial for the party, 1 *H.* 7. 13. *omnia debita* released to the Sherif, and 29 *Ed.* 3. the King seised the lands of a Prior alien, *&c.* and there is a difference between the cases put, and this case; for when the Queen makes a Grant, all matters of interests may pass by the words, but matters of prerogative, as in the cases put by my brother *Puckering* cannot pass, for they are not within the words, but interests are. To that which hath been sayd, that he was not seised of any estate tayl, this is not any argument; for if he had three rights, by the Fine all are gone and passed to the Conisee; for if he be disseised, or discontinue, and then levy a Fine, this is a bar, but

Generall restraint.

Difference per enter rem. & reversion in le Roy.

Difference per enter interest & prerogative.

Touts droits poss. per fine.

Fine puis disseisin ou discontinuance de recovery.

Leſſee pur' ans en reverſion & poſſ. diverſity.

otherwiſe it is of a recovery; for that is no bar, but of an eſtate tayl. And as to the caſe of *Saunders*, that leſſee for years need not to make claim, the caſe was not ſo, but the caſe was of a leaſe in reverſion, and he had never entred, and therefore it was but as a common, or a rent; but if it be a leaſe in poſſeſſion, he is bound, as in *Zouches* caſe. Then becauſe the King is in poſſeſſion, it hath been ſayd that it is no bar; but this ſeemeth to be no reaſon; for the Statute began with the King, and the Preamble ſeemeth to induce it; and the third, ſaving of the Statute, is by force of any gift in tayl, ſo this is generall: And becauſe he cannot diſcontinue, therefore can he not make a bar? *Non ſequitur*: For he cannot diſcontinue, and yet a Fine levyed is a good bar; and the Statute of 32 *Hen.* 8. doth not impair this opinion, but it was to take away the doubt moved in 29 *Hen.* 8. Allthough indeed the Law was allwayes clear in the caſe, as it was agreed by all the Judges in *Stowels* caſe; and the words of the Statute of 34 *Hen.* 8. that the recoveries ſhall be no bar, doth not extend but to the words going before, as in the caſe in *Dyer*, that a man had not done any act but that, *&c.* And the Queen in this caſe hath not any prejudice; for ſhe ſhall have the rent with the reverſion: And as for *Jacksons* caſe; that maketh for me; for the queſtion of the caſe there was, that the remainder ſhall be gone, and we ought not to take regard to that which is ſayd indirectly in the caſe, but the point of the Judgement is the matter; and for authority it is direct in *Dyer*, fol. 26. pl. 1. and therefore it ſeemeth that the entayl is barred; and ſo the action maintainable. *Anderſon*] You have well argued, but for any thing that I ſee, none of you ſhall have the Land; for the Queen is deceived in her grant, and therefore the Patent is voyd, and then it ſhall be ſeiſed into the Queens hands: And therefore you had beſt to be adviſed, and we will hear what can be ſayd for this point at another day. And note, that it was ſayd by the Juſtices, that if a man recover in a Writ of forcible entry, upon the Statute of 8 *Hen.* 6. by confeſſion, or by default, he ſhall recover his treble coſts. 22 *Hen.* 6. 57.

Grant.

3 Coſts in forcible entry.

13.

Replevin.

ONe *Colgate* brought a Replevin againſt *Blyth.* who avowed the taking, and thereupon they were at Iſſue in *Kent*, and the Jury found a ſpeciall Verdict. The caſe in effect was this; Husband and Wife are ſeiſed of Lands in right of the Wife: And ſhe by Indenture in her own name agrees that a Fine ſhall be levyed, and limits the uſes by Indenture. After the Husband by another Indenture agrees that a Fine ſhall be levied, and limits other uſes, and afterwards a Fine is levied by them both; now whether the uſes limited by the Husband

Husband ſhall bind the Land of the Wife in Perpetuity, The Jury prayed the adviſe of the Court, &c. For if they be good, they found for the Plantif, if not, then they found for the Defendant. *Shuttleworth* Serjeant] It ſeemeth that Judgement ſhall be given for the Plantif; For the uſe limited by the Husband, ſhall be a good limitation in Perpetuity, and firſt the Wife only cannot limit any uſe, for her Acts are of no Validity. And therefore if a Wife grant a Rent charge, or make a Leaſe, and the Grantee enter, this is a Diſſeiſin, & 43. *Ed.* 3. Deeds given by a Feme Covert are void. & 17. *lib. Aſſ.* a VVife levies a Fine Executory, *ſur grant & render*, as a ſole Woman, and after a *Scire fac.* Is brought to Execute this Fine, the Husband ſhall extort the Execution, and if it were a Fine Executed, then it is a Diſſeiſin to the Husband. For an uſe is a Declaration how the Land ſhall continue in Perpetuity, and the Feoffees are nothing but Inſtruments, or Organs to convey the uſe, for the Land yields the uſe and not the Feoffees; then when the Wife which is under the Power of her Husband, limits an uſe, this is void, for I hold for Law, if an Infant limit uſes, and after levy a Fine, and do not Reverſe it during his Nonage, yet the limitation ſhall not bind him, and ſo of a man *non compos mentis*. And ſo it was ruled in the Court of Wards, where a naturall Ideot made a Declaration of uſes, and levied a Fine accordingly, that yet it ſhall be to the uſe of himſelf. And then in our caſe the Limitation by the Wife cannot be good, but her Will depends upon the Will of her Husband, and the expreſſing of the uſe by the Husband ſhall be good. For if an Eſtate be made to a Wife, if the Husband ſeaven years after agree, it is good, and ſo it is of a Diſſeiſin to a uſe, ſo of an *Aſſumpſit* to the Wife, 27 *Hen.* 8. ſin *Jordans* caſe, & 1 *Hen.* 7. in *Doves* caſe, and in a *Pracipe quod reddat*, the default of the Wife ſhall be the default of the Husband, becauſe ſhe is Compellable to the Will of her Husband by the Intendment of the Law. 21. *lib. Aſſ.* A man ſeiſed of Land in Right of his Wife, makes a Feoffment in Fee, and would have made Livery, but the Wife would not agree to the Livery, yet notwithſtanding the contradiction of the Wife, the Livery was Adjuged good. & 33 *Hen.* 6. Husband and Wife are Plantifs in an Aſſiſe, and the Husband would Proſecute, but the Wife would be Nonſuite, the act of the Husband ſhall be accepted, and the act of the Wife rejected. So if the Husband will make an Attourny and the Wife wil diſſavow him, yet he ſhall be their Attourny. And as I think this Limitation by the Husband ſhall bind the Wife in perpetuity: For if the Husband make a Leaſe of the wifes Land for 100 years, the Wife may avoid it after his death; but if after they both Levy a Fine, the Leaſe ſhall be good for ever. And 11 *Hen.* 4. He in Reverſion, and one which hath nothing, Levy a Fine, & *quid juris clamat* ſhall be brought againſt them both. And as I conceive it, it ſhall be

Rent ch. ou Leaſe per feme covert.

Fine executory executed per feme covert.

Vſe quod.

Limitation per infant quare.

Non compos mentis. Ideot naturall.

Eſtate, diſſeiſin, & aſſumpſit al feme.

Default del feme.

Livery per baron.

Nonſuite del feme.

Attourny.

Caſe per fine & indenture Difference. Juris clamat.

 counted

Reentry per condition. counted her folly, that will take such a Husband as will Limit such uses. For if a Wife hath an Estate in Land, upon condition for not payment of Rent that the Feoffor shall reenter, if she take a Husband, which doth not pay the Rent, whereby the Feoffor or his Heires reenter, the Estate of the Wife is utterly defeated. And in 4 *Ed.* 2. A woman *Cessavit.* Tenant takes a Husband, who ceaseth by two yeares, whereby the Lord bringeth a *Cessavit*, and recovereth the Inheritance of the Wife, she shall be bound. And this appeareth in *Fitzh.* in *Cui invita.* 21. *Wast.* And it shall be so if the Wife hath but a Freehold, as it is in 3 *Ed.* 3. A woman Lessee takes a Husband, who maketh Wast, whereby the Land is recovered, and 48 *Ed.* 3. fol 18. Husband and Wife sell the Land of the Wife, this is onely the sale of the Husband; but if after they Levy a Fine, this shall bind the Wife. And for expres Authority it is the case in *Dyer*, fol. 290. a. *pl.* 2. *Joynture.* And so it is a Common case if a man seised of Lands, takes a Wife who hath a Jointure in his Land and he makes a Limitation of uses, and after they both Levy a Fine, this shall be the Limitation by the Husband, because it shall be intended that the Wife consented, if it doth not appear to the contrary. Whereby the Declaration of the use here by the Husband, shall be good to bind the Wife, and therefore Judgement ought to be given for the Plantif. *Fenner* to the contrary, for here the Inheritance is in the Wife, and where the Husband limits further than he hath Authority, there the Law shall make a Declaration of the uses, for the Husband cannot Limit uses of that which he hath not, 21 *Ed.* 3. A man takes a Wife seised of Lands in Fee, and before that the *Atteynder del feme.* Husband was intitled to be Tenant by the Curtesie, the Wife was attainted of Treason, the Land shall be forfeit; and 44 *Ed.* 3. He shall *Homage.* not make Homage, before he be intitled to be Tenant by the Curtesie. 12 *R.* 2. *Conusans.* Conusans shall be made by the Bayley of the Husband in the name of the Husband and Wife. And in this case the Conisee *Warranoy.* is in, in the *per* by the Wife, and Warranty made to the Husband shall inure to the Wife; and 18 *Ed.* 3. A man seised of a Mannor in *Villain.* right of his Wife, to which there is a Villain regardant, the Villain Purchaseth Lands, the Husband shall be seised of the Perquisite in right of his Wife. And yet otherwise it is where a man is Lessee for years of a Mannor, to which, &c. For he shall be seised of the Per- *Divorce.* quisite in his own Right. 12. *lib. Ass.* If he be Divorced, his Estate is *Lease & Rent ch. diversity.* gone. And I agree to the case, put by my Brother *Shut.* Where the Husband makes a Lease for years, and after he and his Wife levy a Fine, there the Lease shall be good, but if the Husband grant a Rent charge, and after he and his Wife Levy a Fine, I do not agree that this is good, for in the first case the Conisee found one which had an Interest in the Land, but not in the last. Then, Sir, here the Husband hath no power to Limit the use of the Land of his Wife to indure

for ever. 28 *Hen.* 8. The Feoffeee to uſe at the Common Law, Limits an uſe to a ſtranger, this Deveſteth the firſt uſe, but if he limit it to *ceſtui que uſe*, then it is an ancient uſe, and not new. And ſo it is if Tenant for life, and he in Reverſion levy a Fine, this ſhall be to the uſe of him in Reverſion. And ſo if two Joyntenants be in Fee, and they limit ſeverall uſes, this ſhall be good according to their limitations for the Moities of either of them, and for no more. And if Husband and Wife levy a Fine to the uſe of the Husbands Sonne, yet this is to the uſe of the Wife, but if he be the Wifes Sonne alſo, then this is a good conſideration, and the uſe ſhall be accordingly. And theſe caſes I put to this intent, that when a man limits an uſe which is repugnant, or further than he hath Authority, the Law ſhall make a Declaration of the ſame uſe, for *Bracton* ſaith, *Nemo poteſt ad alterum plus juris tranſferre, quam ipſe habet.* And I take the Law, if Husband and Wife levy a Fine of the Lands of the Wife, and render back to the Wife in Tail, and the Husband dye; and the Wife diſcontinue, that this is not a Purchaſe of the Husband within the Statute of 11 *Hen.* 7. And ſo it was here adjuged in 18. of *Eliz.* in *Alexanders* caſe. And I agree to that which hath been ſaid, that the Wife only cannot limit uſes; but becauſe the Jury hath found for the Defendant, if the limitation by the Husband be not good (as I think it is not) then Judgement ſhall be given for the Defendant. *Adjornatur.*

Feoffee al uſe.

2 Joyntenants.

Fits del baron:

Uſe repugnant.

Fine levie de terres del feme Oue rneder al feme en tail.

Conceſſum.

14

William Knight, as Leſſee for years to Sir *John Forteſcne* and *Rich. Thikſton* Gentleman, brought an Executione firme againſt *W. Brech*, of one Meſnage with the Appurtenances in Themilſtreet in the Pariſh of St. *James Clarkenwell*, the Defendant pleaded not guilty, and the Jury appeared at the Bar, and Evidence given on both ſides; And at the length the Plantif Demurred in Law upon the Evidence given for the Defendant, and thereupon the Jury were diſcharged. And now *Gawdy* the Queens Serjeant came to the Bar, and demanded Judgement for the Plantif, and reherſed the caſe in this ſort. The Prior of St *Johns* of *Jeruſalem* in *England* by deed Indented, *A.* 29 *H.* 8. Deviſed a Meſuage called the high Houſe, 13 Cotages, one Stable, and 14 Gardens, for 59 yeares to one *Cordall*, rendring 5. l. 6. ſ. 11. d. *viz.* For the 13 Cotages, iij. l. And for the high houſe xiiij. ſ. and for the Stable xx. ſ. and for, &c. And if it happen the Rent to be behind by three months, then the Prior to reenter; after by an act of Parliament, *An.* 31. *Hen.* 8. the Priory was given to the King, and hee Veſted in actuall Poſſeſſion thereof, with all Conditions and Covenants &c. as the Leſſor had. Afterwards the King 29. *Sept. An.* 36. by Letters Patents gave the Stable to the ſame *Cordall*, and

Eject. firm.

Demurrer al evidence.

The caſe.

and one *H. Audley* in Fee, and the Reverſion of the other Parcells deſcended to the Queen which now is, whereupon 8 *die Maii, An.* 23. Iſſued a Commiſſion out of the Exchequer to enquire, *ſi predict. Cordall & aſſign. ſui perimpleviſſent & performaſſent omnes conventiones & promiſſiones, fact. & reſervat. ſuper predict. Indent. dimiſſionis & premiſſis fact. &c.* And the Commiſſion was retourn'd in *Michaelmas* Term after, and it was found that the four uſuall Terms in *London* are the Feaſts of St. *Michael*, the Birth of our Lord, the Annunciation, and the Birth of St. *John Baptiſt*, for the Rent was to be paid, *ad quatuor terminos Anni infra Civitatem London uſuales.* And further by the ſame Iury, being a Iury of *Middleſex*, it was found that 37. ſ. 5. d. ob. Part and Parcell of the ſaid Rent, were behind not paid, by three Months next after *Michaelmas* laſt paſt before the taking of the ſaid Inquiſition. *Cordall* made *Burnell* his Executor, and died. *Burnell* granted all the Term to *Brech* the Defendant. Afterwards the Queen 5 *Auguſti An.* 23. (which was before the return of the Inquiſition) and before any Entry or Seiſure made by her, or by any other, to her uſe, granted the high Houſe to Sir *John Forteſcue* and *Thekſton* in Fee, and they entred upon *Brech* and made the Leaſe to the Plantif for three yeares, *&c.* And firſt it is to be conſidered if they be ſeverall Rents in this caſe or no; becauſe he ſaith, *viz.* For the high houſe 14. ſ. *&c.* For that I take the Law to be very ſtrong, that they be ſeverall Rents, for allthough that he ſaith firſt, requiring 5. l. 6. ſ. xj. d. which is an entire ſumme, yet when he ſaith afterwards, for the high Houſe ſo much, and for the Stable ſo much, *&c.* This maketh a ſeverance, and for that I will remember the caſe in *Dyer*, fo. 308, ſo I hold the Law, if a Feoffment be made by two, rendring xx. l. a year, *viz.* x. l. to the one, and x. l. to the other, theſe are ſeverall Reſervations; but becauſe I hold the Law clear in this point, I will ſpeak no more to it. Another matter is when the Commiſſion iſſueth to enquire of all Covenants and Promiſes conteined in the Indenture to be performed by *Cordall*, if the finding by the Jury be conteined within theſe words, Covenants and Promiſes, *&c.* And I think they be; for if a man make a Leaſe to one for years, and if it happen the ſaid Rent to be behind, that then it ſhall be lawfull to the Leſſor to reenter, as I think this is a Proviſo for the Rent; ſo the caſe in 22 *Hen.* 6. A Leaſe was made for years, rendring Rent, the Leſſee is bound to perform all covenants and agreements; if he do not pay the rent the obligation is forfeit; for the payment of the rent is an agreement: So in this caſe the proviſo doth extend to the payment of the rent. And as for the exception which was taken, *viz.* That the Jury find that 37 ſ. of the rent was behind, and doe not ſay expreſly, for the houſe which is now in queſtion, I hold that a vain exception; for when they have found that more was behind than that which

Uſuales termi-nos.

Severall Rents. Conceſſum per Fenner, Rodes.

Feoffment per deux.

Conc. per Rodes. Leaſe ſur condicion en un proviſo.

Rent an agreement. Cooceſſ. per Fenner.

which was now in queſtion, allthough that it be in generality, yet it is good for the particularity; and for that matter I could remember many caſes, but I will not doubt of a matter (as I think) without doubt. But for the condition, which is the great matter of the caſe, Firſt, the condition is veſted in the King, by the expreſs words of the Statute and, as I think, grant of parcell ſhall not extinguiſh the whole condition. In the caſe of a common perſon the condition ſhall be utterly gone, and ſo are our Books; otherwiſe, peradventure, I would doubt of that allſo; but becauſe the Book is ſo, in *Dyer* 14 *Eliz.* fol. 309. I will ſpeak no more of it; but the caſe of the King differs from a common perſon; for as he is the Head, and ſupreme Governour of the Commonwealth, ſo he is the ſuperior in Prerogatives and Preheminences. 13 *Ed.*3.& 14 *Ed.*3. A rent charge granted to the King, he ſhall diſtrein for it in all the lands of the Grantor: and 8 *Hen.* 5. if a rent ſeck cometh to the King, he ſhall diſtrein for it, and yet it is called ſeck, becauſe no diſtreſs is incident thereto: And there the principall caſe was of a *Fieri facias.* & 2 *Hen.*7. the King ſhall not demand his rent. But it hath been ſayd, that becauſe conditions go to the deſtruction and determination of eſtates, that therefore they ſhall be taken ſtrictly; to which I agree; but not in the caſe of the King, as in *Bro. Apportionment* 23.& 168. and ſo are the preſidents in the Exchequer, if a man be bound in a Statute Merchant, and after the Coniſor enfeoffes the King of parcel of the land, and enfeoffes a ſtranger of another parcell, and afterwards the Statute is forfeit to the King by atttainder, the King ſhall have execution againſt the other feoffee: And in many other caſes the King is privileged, eſpecially in things entire: For if there be two Coparceners, and one be in ward to the King, he ſhall have the entire preſentation of all. And in this caſe, I think, that before the condition ſhall be deſtroyed, that the Patent made to *Cordall* ſhall be voyd; for it is not *ex certa ſcientia, & mero motu*, but it is generall, and it was not the intent of the King to take away the intire condition: And allthough the King grants the reverſion, yet the condition which was once veſted in the King, as I think, remains in him ſtill; for in 31 *Edw.* 3. an advowſon deſcended to three perſons, and the youngeſt is in ward to the King, and he granted it to Queen *Philip* his Wife, and ſhe granted it over to the Earl of *Arundell*, who granted it to the eldeſt parcener, the Church became voyd, the King had the preſentation; for when the King was poſſeſſed of the wardſhip of the youngeſt, he was intitled to preſent for all; and when he granted the ward over, this did not deveſt the title of the two eldeſt which was veſted in him before: and 37 *Hen.* 6. the Grant of the King upon a falſe ſuggeſtion is voyd; and in *Littleton*, he ſhall have account againſt Executors; and yet the Law is clear, that an Action of Account will not lie againſt Execu-

Condition.

Rent charge to the King.

rent ſeck.

No demand by the King.

Cond. ſtrictly taken.

Coniſor enfeoffes le Roy.

Entire preſentation.

Advoſon to 3 parceners.

Falſe ſuggeſtion

Account.

tors;

tors; & ſo for all thoſe Reaſons Judgment ſhall be given for the Plaintif. *Fenner* to the contrary: And firſt, I agree that they are ſeverall reſervations; and ſo is the caſe which hath been remembred in 8 *Ed.* 3. A Leaſe was made of eight Acres of land, reſerving eight ſhillings of rent, *viz.* for every Acre 12 d. this is ſeverall; and to that which hath been ſayd, that the condition is a proviſo, I deny that; for a proviſo, as me ſeemeth, either is in the affirmative, that a thing ſhall be done; or in the negative, that it ſhall not be done; but here it is neither directly affirmative, nor negative, and therefore they have found it without commiſſion; but I confeſs that agreement extends to rent, 22 *Hen.* 6. & 14 *Hen.* 8. then the Jury which was of *Midleſex* have found the four uſuall Feaſts in *London*, *viz.* St *Johns*, *&c.* and this as it ſeemeth they cannot doe, becauſe it is a thing in another County; eſpecially they being but an Inqueſt of Office. Further, they have found that 37 ſ. was behind at one Feaſt, and this is impoſſible; for then the entire rent ſhould amount to 7 l. And further, the Leſſors have purchaſed the reverſion, before the return of the Inquiſition and Commiſſion, and then the Queen cannot be intitled, becauſe ſhe hath not the Freehold; for it hath been adjudged here, that if a man ſell his lands, and afterwards makes livery thereof, and after inrolls the ſale, this ſhall not have relation to the date of the deed, becauſe it takes effect by the livery which was before the inrolment: And 8 *Edw.* 3. A man attainted of Treaſon makes a feoffment of his land after he is reſtored, yet he ſhall not have the land; yet if he had not made the feoffment, he ſhould have been reſtored to the land with the mean profits. Then if the King grants the reverſion, if he ſhall have the condition remaining, and I think not; for the King hath it by expreſs words of the Statute, as the Prior had it; and if the Prior had granted parcell of the reverſion, the entire condition had been gone, and the King ſhall be in the ſame caſe; for *Ceſſavit* is given by the Statute of *Weſtminſter* 2. cap. 21. *eodem modo* as in the Statute of *Glouceſter*, cap. 4. This doth not ly of an eſtate tayl, no more than a *Ceſſavit* by the Statute of *Glouc.* 8 *Ed.* 2. And ſo I think Judgement ſhall be given for the Defendant.

Several reſervations.

Proviſo quid ſit

Agreement.

Feoffment puis atteynder.

De percell de Reverſion.

De

De Term. Trinitat. Anno xxviij. Eliz. *Reg.*

I.

Rodes Juſtice] Judgement ſhall be given for the Plaintif. Firſt, I agree that they are ſeverall rents; and yet this queſtion doth not goe to the overthrow of the Action; in proof whereof both great reaſon and authority is copious: For if the Leſſor had entred into parcel, this had not ſuſpended the entire rent; or if the reverſion of parcel thereof were granted, this ſhall carry no more than that which is granted; (& ſo it was held by the Juſtices) when it was granted to *Cordall*. And 2 *Hen.* 6. if I reſerve an entire rent, and the Leſſee will pay but parcell, *&c.* & 17 *Ed.* 3. fol. 52. by *Sharde*. & 11 *Ed.* 3. *lib. Aſſ.* If I make a Leaſe of two Acres, reſerving for the one Acre x. ſ. to me and to mine heirs; and for the other Acre x. ſ. generally: And *Dyer*, fol. 308. *b.* & 29 *Lib. Aſſ.* pl. 23. If three Coparceners be, and rent be reſerved for equality of partition, but one *Scire fac.* ſhall be brought; for it is brought but upon one record; and *Littleton* pl. 316. but one action of debt for Tenants in common, but ſeverall Avowries; ſo I hold that they be ſeverall rents in this caſe, and yet but one condition: And for that let us ſee if by grant of parcel, the entire condition be gone. In the caſe of a common perſon, it is all gone, as it was adjudged here in *Hill.* laſt, where a man makes a Leaſe for years, reſerving xx l. for rent, and allſo a ſum in groſs of xxv l. was to be paid to the ſame Leſſor, upon condition, if the rent, or ſum in groſs were behind, then a re-entry to be made. Afterwards the Leſſor took an Eſtate back again of parcell of the term, the ſum in groſs was not payd, and it was adjudged that he ſhall not take advantage by the condition; for when he took an eſtate back again, the rent was ſuſpended, and then for the ſum in groſs he ſhall not re-enter, becauſe the condition was entire; but allthough that the caſe of a common perſon be ſo, yet the Princeſs caſe differs; for ſhe ſhall have her Prerogative; and for the Preheminence which the Queen ſhall have, I referre you to the argument of Iuſtice *Weſton* in the caſe of the Lord *Barkley*: And that the Queen ſhall have her Prerogative in a condition, I will remember the caſe of the Abeſſe of *Sion*, & 38 *Hen.* 6. & 21 *Hen.* 7. the King may make a feoffment in fee upon condition that the Feoffee ſhall not alien, and 2 *Hen.* 7. & 35 *H.* 6. he may reſerve a rent to a ſtranger; and 21 *Eliz.* the Queen grants her debt to another, and he in reaſonable time will not proſecute, the Queen may take it again,

Parcel entred into.

1. *Scire fac.*

Sum in groſſ, and rent reſerved upon cond.

Cond. entire.

Coment.

Feoffment in fee upon cond. reſervation.

Grant of a debt gain, and may ſue: And allſo *Cranmers* caſe, where King *Hen.*8. gave lands to the uſe of him for life, and after to the uſe of his Executors for twenty yeares, after he was attainted, the Queen ſhall have this rent as a rent charge, and yet ſhe had the reverſion before. And in reaſon it ſeemeth the Queen may apportion her condition; for if this condition by the grant to *Cordall* ſhall be avoyded, four principles ſhall be overthrown; for it is a principle That the King ſhall not be deceived in his grant. 2. *Item*, that when concourſe and equality of titles come together, the King ſhall be preferred. 3. *Item*, in entire things he ſhall have all. 4. *Item*, that his grant ſhall not extend to ſeverall intents or purpoſes: For the firſt, if the King be deceived in the operation of the Law, his grant ſhall be voyd, as where he grants to a man and his heirs males, this ſhall be voyd. 6 *Hen.*7. releaſe of all demands. 11 *H.*7. 10. releaſe of all action, and yet in thoſe caſes there is matter of intereſt and not prerogative, and yet nothing paſſeth if ſhe be deceived. For the concourſe of title, 4 *Ed.*6. a man makes a feoffment in fee, upon condition that the feoffee ſhall not commit treaſon, after the feoffee commits treaſon, the King ſhall have the land, & 44 *Ed.*3. *per Thorp*, tenant of the King, *&c.* he ſhall have the rent again: And for the caſe of the Lady *Hales* in the Comentaries, where lands deſcend to a villain. For entireties, 44 *Ed.*3. the King and others give lands to a Monaſtery, the King ſhall be ſole Founder, 19 *Hen.*6. he ſhall have the intire obligation where the one obligee is outlawed: and in 11 *Hen.*7. & 2 *R.*3. two are indebted to the King, and he releaſeth to one of them, then his grant ſhall not inure to two purpoſes, *Baggots Aſſ.* And ſo if the King give lands to his villain, this ſhall be no enfranchiſment to him. So for all thoſe reaſons I hold the condition may well enough be apportioned. Then for the third matter, when the commiſſion iſſueth to enquire of all covenants and proviſoes, if the condition be within thoſe words; and for that point I think that the Plaintif ſhall recover; for allthongh it be not within the words, yet the commiſſion is generall after; but yet I hold that is within the words, 21 *Hen.*7. fol. 37. *per Fineux.* If I let land for term of years, rendring, *&c.* I ſhall have debt or covenant at my election: and *Dokerayes* caſe, 27 *Hen.*8. Proviſo is a condition, and ſo it was held here in the caſe of the Lord *Cromwell* and *Andrews*. Then when the Jury found that 37 ſ. 5 d. ob. were behind, if this office be good or no? and in my conſcience that which is good, ſhall be taken for the Queen, and the reſt ſhall be voyd; for offices between party and party may be voyd for uncertainty, as the caſe is in *Dyer*, 3 & 4 *Eliz. Office in Beverley*, &c. fol. 209. Or they may be avoyded for falſity, 1 *M. Culpepper* fol. 100. *b.* Or for inſufficiency, as in my Lord of *Leiceſters* caſe in the Comentaries, but this is only for the Queen, and therefore ſhall be taken favourably, and therefore I will

Rent charge after atteynder.

4 Principles for the King.

1. *Releaſe ſeveral.*

2. *Treaſon.*

3. *The King ſole founder. Obligation. Releaſe to the oblige.*

4. *Villain.*

Proviſo is a condition. Offices voyd.

compare,

compare it to a verdict where ſurpluſage is found, 3 *Hen.* 6. *Plene adminiſtravit*, and the Jury found that they have more than Aſſets. 47 *Ed.* 3. the Jury found that he which prayed to be received had nothing in the land, where the iſſue was joyned, whether the particular tenant had a fee. And 39 *Hen.* 6. 9. ſurpluſage in an Inquiſition. & 5 *Hen.* 5. fol. 2. *Cobhams* caſe, where they found a Divorce in *Kent*, *&c.* Allſo, Sir, Offices may be good for that which is certain and voyd, for that which is uncertain, and good for the King, and not for a ſubject, *Strenes* caſe, in 15 *Edw.* 4. & 14 *El.* Office found after the death of the tenant by the curteſie, & 29 *H.* 8. *Br. tit. Office devant Eſcheotr*, 58. And if a commiſſion be awarded, and the Iury ſay, that *de quo tenetur ignorant*, then a *melius inquirend.* ſhall goe forth; but if they ſay, *per quæ ſervicia ignorant*, then nothing ſhall be done, but it ſhall be intended Knights ſervice, and ſo is the experience of the Exchequer. And here they have found that more was behind, *ergo*, they have found that ſo much was behind, *Quia omne majus continet in ſe minus.* Then if this be within the Statute of 18 *H.* 6. c. 16. And it ſeemeth that it is not; for that Statute as I think is but an expoſition of 8 *H.* 6. and that ſpeaketh of Leaſes by Treaſurer and Chancellor, and for that ſee the caſe of the Duke of *Suffolk* 3 & 4 *Ph.* & *Mar. Dyer*, fol. 145. And ſo I think for all theſe cauſes judgement ſhall be given for the Plaintif. *Peryam* Juſtice to the contrary. For the firſt matter, I agree that they be ſeveral rents for the *viz.* here doth expound the matter, and when the *viz.* may ſtand with the premiſes, then it is good, and otherwiſe not, and for that the caſe in 17 *lib. Aſſ.* which hath been vouched, and diſſeiſin of one is not diſſeiſin of the other rent: And there is a plain difference between an annuity and a rent ſervice, becauſe for an annuity it is the book in 29 *Edw.* 3. fol. 51. & 29 *lib. Aſſ.* 3 Parceners, and rent reſerved for equality of partition, *&c.* vouched by *Rodes*; but if I grant you xl ſ. out of my Mannor, *viz.* x ſ. out of parcel in the tenure of *A.* and x ſ. out of another parcell, this is voyd; for firſt there was a grant out of the entire Mannor, 9 *lib. Aſſ.* yet this is one leaſe, & but one reverſion, & but one condition, & the condition is entire, and that is wel proved by the expreſs words of the condition (*totaliter reentrare*) and this proved by *Winters* caſe in 14 *El.* and *Rawlins* caſe adjudged, where the ſum in groſs was behind, the caſe vouched by *Rodes*, 33 *Hen.* 8. in a common perſons caſe it cannot be divided, neither by title, nor by the act of the party. If ſurrender be made of parcell, the rent ſhall be apportioned, but the condition is utterly gone: But peradventure it will be objected, that in 17 *Eliz.* the condition there was divided, where he aliened parcell with the conſent of the Leſſor, and the other parcell without conſent, and in that the Leſſor entred for the condition broken; I grant this caſe, and yet this doth not prove that a condition may be apportioned; for the

Superpluſage in a verdict.

Reſceit. Inquiſition.

Dyer.

Videlicet.

Difference between an annuity and a rent charge.

Rent limited out of an intire mannor.

Totaliter. Dyer.

Cond. is undeviable.

Surrender of parcel. Dyer.

Cond. apportioned.

 reaſon

reaſon in that caſe is, when he made ſuch a condition, the condition extended but to that which he aliened without licenſe, and to no more, and ſo I hold the Law where a leaſe is made of twenty Acres, with condition, *&c.* and parcell is evicted. And warranty at the Common Law cannot be divided; for if two Coparceners were who had warranty to detain, and they made partition, the one could not vouch without the other, and therefore ſhe ſhould pray in ayd, and then both to vouch Paramount, and ſo the Statute which giveth partition between Joyntenants ſaveth their warranty, otherwiſe it were gone. And ſo if two Joyntenants make a leaſe for years, reſerving rent upon condition, and after they make partition (as they well may, having the reverſion and the freehold in them) I hold the Law clearly, that the one nor the other ſhall enter for the condition broken: Then in the caſe of the King, I hold the Law that it ſhall not be apportioned; and yet I agree that the King ſhall have his Prerogatives for his preſent lands and goods, but he ſhall never have Prerogative when wrong ſhall be done to any man. If the King have a Rent chage, and after Purchaſe parcell of the Land charged, it ſhall be apportioned, 21 *Hen.* 7. he may well condition that his Feoffee ſhall not alien; for in thoſe caſes there is no prejudice to others, but all thoſe caſes run upon other grounds. And in *Bartlets* caſe, the King is bound by the Statute of *donis conditionalibus*, for it was a wrong that the Donee at the Common Law ſhould alien the inheritance. And this caſe as me ſeemeth is not within the concourſe of Title, as my Brother *Rodes* hath argued, neither is the King deceived as hath been ſaid. For when the King enters, he ſhall be ſeiſed in *priſtino ſtatu ſuo*, and this is a principall reaſon in *Winters* caſe; & 16 *Eliz.* a perſon makes a Leaſe reſerving Rent, upon condition, that if it be behind & lawfully demanded, that then he ſhall re-enter, after the reverſion cometh to the King, he ſhall not make demand, I agree well thereto; the reaſon is, becauſe the demand is a thing which goeth to the perſon of the King. Then, Sir, the Statute is, that the King ſhall have it as the Prior had it, which is meant of the eſtate and not of the perſon of the King: Then, Sir, it is impoſſible that the King ſhould have the land as the Prior had it, *ut in priſtino ſtatu ſuo*, if he doe not utterly defeat the grant made to *Cordall*; then here the condition is gone, but not by any grant as it hath been moved, but by the operation of the Law: And 49 *Ed.* 3. the King grants that lands ſhall be deviſable, it is voyd, becauſe it is againſt the Law; and it is againſt the Law, that a condition ſhould be apportioned, *ergo*, the King ſhall not apportion it. But admit this queſtion againſt me, then let us ſee what title the Queen hath by this commiſſion. Firſt, the commiſſion is to enquire if *Cordall* his Aſſigns and Farmers have performed all covenants and proviſoes contained in the Indenture; as

Eviction.

Garranty. Voucher.

Partition of a reverſion.

Prerogative.

Rent charge apportioned.

Concourſe of title.

Dyer.

Demand.

The Kings grant againſt the Law is voyd.

Proviſo.

for

for that I hold the law clear that they have authority, by those words, to enquire of the condicion, but for other reasons I think the Commission void. For the Commission is to enquire *per bonos & legales homines de Com. nostro Midd.* and it doth not appear here that the Jurors were of *Middlesex*, and therefore the inquisition is not good. Further, they have found a thing in another County, and this they cannot find, but I hold that the Jury in one County, may find the generall issue in another County. Allso I hold that when the party cannot plead that which is the great matter of the Action, they may find it in an another County because the party cannot pleade it, as in 9 *Ed.* 2. in debt against Executors, *&c.* And for these reasons I hold judgement is to be given for the Defendant.

Severall & spe- *special finding.*

2.

Richard Heydon, Gentleman, demands against *Benjamin Ibgrave*, Gentleman, the third part of 40. Acres of Land with the appurtenances, in three parts to be divided, in *Sarrot* in the County of *Hartford*, as his right and Inheritance, and to hold of our Lady the Queen in *Capite*, and Laies the Esples in the time of *Ed.* the sixth, and that such is his Right he offers himself, *&c.* And the aforesaid *Benjamin* put himself upon the great Assise whether it be his right or no, *&c.* And now the Assise made by the four Knights appeared at the Bar, *Snagg* Serjeant for the Plantif, we challenge *A. B.* for that, *&c.* *Nelson* chief Prothonotary & all the Court, you cannot challenge, because it was made by the four Knights, and the Assise is now at the Bar. *Snagg*] well Sir, then we will give evidence. *Anderson*] for whom are you? *Snagg*] for the Plantif. *Anderson*] then you shall not give evidence first, for the Tenant affirms that he hath more right, and that ought to be first proved. *Rodes* and all the Court] So it was here rul'd five years ago in *Nowells* case, and thereupon *Puckering* gave evidence for the Tenant, that it was Parcell of the Mannor of *Sarrot*, which Mannor the Tenant hath, and this was granted by the Counsell of the Defendant. And in conclusion upon the evidence given, the Defendant would have had the Tenant to have Demurred upon his evidence, and discharge the Inquest, but the Tenant would not; in effect this was the doubt. *K. H.* 8. by his Letters Patents, gave among other things, all the Lands which were in the Tenure of one *Whyton*, and demised to *Johnson* in the Parish of *Watford*. And it was true that the Lands were in the Tenure of *Whyton*, but not demised to *Johnson*, and allso they were not in the Parish of *Watford*; if this shall be helped by the Statute of Misrecitall, and not Recitall, is the question, and the party did not aver that the intent of the King was to pass this Parcell now in question to the Patentee,

Misre-cital in Letters, Patent.

Challenge.

Evidence.

Misre-citall.

and

and the opinion of all the Court, was, that it is not within the Statute clearly, but they ſaid to the Jury, that they may find all this matter if they will, or otherwiſe ſay what they will. And thereupon after they were agreed, they came again to the Bar, and then all the Court told them, that yet they might give a ſpeciall Verdict. The Jury ſaid we are all agreed that the Tenant hath more right to hold theſe Lands as he now holdeth, then the Demandant as he demands them. *Anderſon*] then are you diſcharged, and as I think you have done well. So they gave their Verdict according to the opinion of the Court for the Statute of Miſrecitall, and yet *Peryam* was well content to have them give a ſpeciall Verdict, and the Demandant was demanded, who appeared, and thereupon Judgement finall was given for ever againſt him.

3.

Hue and Cry.

ONe *Tirrell* brought an Action of Debt againſt a Hundred in *Eſſex*, for that he was robbed and made hue and cry according to the Statute of *Wincheſter*, the Defendant pleaded that he was not robbed, and a full Jury appeared at this day, and upon the giving of the evidence *Shuttleworth* moved for the Defendant, that it appeared by the Plantifs own evidence that the money was my Lady *Riches*, and that the Plantif was but her receiver, and then as he thought the Action ſhould have been brought by the Lady, and not by *Tirrell*. *Anderſon*] in my opinion without queſtion the Action is well brought, for when he had the money, and was robbed, the money was taken from him, and he was her receiver, and Vouched a caſe in 3 *Ed.* 3. where a man takes my Corn from me, and after, *&c.* the King ſhall have it, and ſo of money, for it cannot be kno wn from other money. *Rodes* to the ſame intent, for if my ſervant be poſſeſſed of my goods, and be thereof robbed, he ſhall have an appeal. *Windham*] I have ſeen that a man ſent his ſervant to *London* with money, and he was robbed coming from thence, and the opinion of the Court was, that the ſervant ſhould have an Action againſt the Hundred. *Peryam*] So I thiuk clearly, whereby the Jury found for the Plantif.

Receiver.

Appeal.

4.

Quare impedit.

THe *Quare impedit* by *Moor* was moved again, and the opinion of the Court was, that the Biſhop, as well for his contempt in not retournig the firſt VVrit, as for his evill retourn made upon the ſecond Writ (for it appeared that he which he ſaid was inducted of the preſentation of the Queen, was Defendant in this Action) ſhould be amerced, and ſo he was amerced at x. l. and a new Writ awarded to admit the Clerk of *Moor*.

5. An

5.

Slander.

AN Action upon the case was brought in the King Benchs for saying that the Plantif was a forging knave, and a Verdict given for Plaintif. And it was spoken in arrest of Judgement, *Gawdy Justice inchit capiat per billam*, for the Action is not maintenable.

6.

WAlmysley came to the Bar & shewed how *Lennard Custos brevium*, had brought an Action of Trespass against another, the Defendant justified, by reason that Sir *Christo. Heydon* was seised in Fee, and infeoffed him, & gave a colour to the Plaintif. The Plaintif replied *Feoffment.* that Sir *Christofer Heydon* died seised, and it descended to his Son, who enfeoffed the Plaintif. *Absq; hoc*, that *C. H.* enfeoffed the Defendant. And the Iury found a speciall Verdict, *viz.* That *C. H.* was seised and made a lease for years to the Defendant, and afterwards by his Deed conteyning *dedi, concessi, & confirmavi*, gave it to the Defendant and his Heirs with Letters of Attorny to make livery; if this were a Feoffment or but a confimation was the doubt. *Walmysley*] It is but a *Feoffment.* confirmation when it is, by deed and hath words of confimation. *Anderson*] Then by your reason, he in Reversion cannot enfeoffee his Lessee for years by deed, as he may without deed, but I think the Lessee is at liberty to take it as a Feoffment, or as a confirmation. *Walmysley*] Sir I think that when the Lessee takes the deed, immediately this is a declaration of his meaning, to have it as a confirmation, by your favour. *Anderson*] And by your favour, when the Lessor sheweth his meaning, to make livery, and the Lessee his meaning, to accept livery, and livery is made accordingly, is not this an expres declaration that he will take it by the livery? and shall this livery be idle? no Sir, and see *Bracebridges* case in the Commentaries, where Tenant in tail makes a bargain and sale, and makes livery, and within six months Enrolls it, this is adjudged a discontinuance, and yet the bargain and sale is not any discontinuance, and if you well mark the cases you shall find but little difference. *Walmysley*] If Tenant in *Disseisin.* tail bee disseised, and it is agreed between the disseisor and the disseisie, that the disseisee shall make a Feoffment to the disseisor, and make such a deed as this, the disseisor shall not have election to take it as a Feoffment. *Anderson & tota Curia*, the cases differ, for the disseisee hath not any power to make a Feoffment. *Walmysley*] Well, will you give us a day to argue this matter, and the other. *Feryam*] For the other if you will. *Walmysley*] No Sir, if this point be no hotter than the other. *Feryam*] The other is cold enough. And so the

Court held the Feoffment good clearly. And they laughed upon *Lennard*, becauſe he had profited ſo well by his action.

7.

LAnds were given by fine, to one *Jones* and his Wife, and to the Heirs of *Jones* upon his Wife ingendred, the Remainder to one *Owen* in Fee. Afterwards *Jones* only without his Wife ſuffers a Common Recovery with Voucher, the Wife dies, *Jones* dies without Iſſue, and *Owen* brought a *Scire facias* to execute this fine, and the Tenant pleaded the Recovery in Bar. *Snagg*] the Recovery is good to Bar *Owen*: For if there be a ſufficient Tenant, againſt whom the *Precipe* is brought, then is it good. And as I think here the Husband is a ſufficient Tenant. The caſe in 16 *Hen.* 6. in a purchaſe to the Husband and Wife, during the Coverture there are no Moities, and the caſe in 23 *Hen.* 8. Recovery againſt Husband and Wife where the Wife is Tenant in tail, and they Vouch over, it ſhall be a Bar to the intail, *vide Bro. titulo Recoverie in value.* 27. and yet the Husband had nothing but in right of his Wife, ſo in this caſe. *Walmyſley* to the contrary. For if the recompence here doth not go to the Eſtate of him which brought the *Scire facias*, then it ſhall be no Bar, & in 9 *Edw.* 4. an Action was brought againſt two Executors, when there were four, and a Recovery had againſt them two, the other ſhall falſifie, for that they had equall Authority, and here the Husband and Wife have equall Authority, & 10 *Ed.* 4. the Wife ſhall have an Aſſiſe, if a Recovery be had only againſt the Husband, & 2 *Ed.* 4. he in Reverſion prayed to be received, he ſhall plead that the Tenant held joyntly with another, and the reaſon is, if he ſhould be received only upon the default of one of them, then he cannot have his recompence over Paramount, & 18 *Hen.* 6. 1. & 13 *Edw.* 3. Husband and Wife Ioyntenants for life, and he in Reverſion will grant the Reverſion of the Husband only, this is void, for he hath not any ſuch Reverſion. And here the Eſtate of Husband and Wife and he in Remainder is all but one, and then the Eſtate of the Husbaud only, is not the ſame Eſtate, and the caſe in 23 *Hen* 8. vouched by *Snagg*, ſeemeth to make for me, for the reaſon wherefore he ſhall be barred is, becauſe the recompence goeth according to the Eſtate which the Wife had, and then it is reaſon that he ſhall be barred, but in the ſame caſe, if the Husband ſurvive, it is ſaid in the ſame Book, that the Iſſue ſhall be at large, for that the recompence goeth to the Survivor, but let it be as it may be, the reaſon of the caſe is for the recompence. And I think, that this caſe here will be proved by *Snowes* caſe in the Commentaries. Recovery had againſt Husband and Wife, where the Wife had nothing, all the recompence ſhall be to the Husband. 10 *Edw.* 3.

Scire facias. Recovery.

Moities.

Falſifying of recovery per executors.

Reſceit per def. de un Joynt.

Grant de reverſion de un Joynt.

Com. 5. 14.

Dower

Dower brought againſt husband and wife, and the husband vouch to warranty, *&c.* & 38 *Ed.* 3. *Præcipe* againſt Tenant in tayl, & 8 *Eliz.* in *Dyer*, fol. 252. where the husband was tenant for life, the remainder to the wife in tayl, the remainder in fee to a ſtranger, and a recovery ſuffered; and about 15 *El.* was a caſe in the Exchequer, where lands were given to *Norrice* and his wife, and to the heirs of the body of *Norrice*, the remainder in fee to a ſtranger, and a recovery ſuffered againſt *Norrice*, he in remainder was attainted, and *Norrice* and his wife were dead before, and by the opinion of *Sanders* then chief Baron, the moity ſhall be forfeit by the atteynder: And recompences are but as exchanges; and *Bracton* calleth them *Excambia*; and I think if an exchange be executed in the one part, and not in the other, it is not good, and ſo I think the recovery ſhall be no bar.

Dower.

Remainder.

Recompences.

Exchange executed.

8.

IN a Writ of Dower brought, *Gawdy* Serjeant ſhewed how that the husband of the demandant had given certain lands to her in lieu of her Joynture, upon condition that ſhe ſhould make her election within three moneths after his death, and ſhe made her election to have the Joynture, and now ſhe had brought her Writ of Dower againſt the heir by covin, and he hath confeſſed the Action, to the intent that *Thynne* who had a leaſe for yeares of the firſt husband ſhould loſe his term, and prayed ayd of the Court. *Fleetwood* for the demandant] There is not any ſuch Joynture as you ſpeak of; for that which was given to the wife was but a leaſe for yeares, and that (you know) cannot bar her of her Dower. *Rodes* Juſtice] If the caſe be ſo, then is there no cauſe to bar her of her Dower; for a leaſe for years cannot be a Joynture. *Quod* Peryam *conceſſit* clearly, and ſayd that the Joynture ought to be a freehold at the leaſt, or otherwiſe it is no bar to the Dower, whereby *Gawdy* moved another matter.

Joynture.

Covin.

Leaſe for years.

De Term. Mic. An. Reg. Eliz. xxviij. & xxix.

I.

Jeofayle.

AN Action upon the caſe was brought for calling the Plaintif falſe perjured Knave; the Defendant juſtified, becauſe the Plaintif had ſworn in the Exchequer that the Defendant had refuſed to pay the Subſide, where in truth he had not ſo done. The Plaintif replyed, *de injuria ſua propria abſque tali cauſa*, the Action was brought in *London*, and there it was tryed for the Plaintif, and great damage found; and this matter was alleged in Arreſt of Iudgement becauſe the triall was in *London*, whereas the Perjury was ſuppoſed to be made in the Exchequer: The Court ſaid, that the matter is tryable in both Counties; and it was anſwered again, that *London* cannot joyn with any other County. *Anderſon*] Then is your Iſſue vitious; for when an Iſſue is tryable by two Counties, if they cannot joyn, then ought you to make ſuch an Iſſue as may be tryed by one onely. And by all the Court, this ought to have been tryed in *Middleſex*, for there the Perjury is ſuppoſed to be committed, whereupon the Iſſue is taken. *Per am* to the Serjeant of the Plaintif] See if you be not ayded by the Statute of Jeofayles. *Walmiſley*] It hath been allwayes taken, that if the triall be evill, it is not ayded by the Statute of Jeofayles. *Peryam*] Then are ye without remedy; for you ſhall have no judgement. *Et ſic fuit opinio Curiæ.*

Triall locall.

London cannot joyn.

2.

Joyntenancy. Partition. 18 Eliz. 350.

Joyntenant by deviſe.

Deviſe in tayl of an heir.

Gawdy came to the Bar, and ſhewed how a man deviſed his lands to his two Sons, and their heirs, and they had made partition by word without writing: *Tota Curia*, What queſtion is there in it? the partition is naught without doubt. *Rodes*] It hath been adjudged here, that if the partition be of an eſtate of inheritance, it is not good by paroll. *Gawdy*] But I think that when a man deviſeth his lands to his eldeſt Son, and his youngeſt Son, in my opinion they are Tenants in common, becauſe the eldeſt ſon ſhall take it by deſcent. *Peryam*] But I think not ſo; for if a man make a gift in tayl to his eldeſt ſon, the remainder in fee, *&c.* Is not he in by the deviſe? *Gawdy*] This is another caſe. *Peryam*] In my caſe he ſhall take by the deviſe

devise for the benefit of the issues, and in your case he shall it take by the devise for the benefit of the survivor, and therefore I think that they are Joyntenants. *Anderson*] There is but small doubt but that they shall be Joyntenants; and there is authority for the case: And this at length was the opinion of the whole Court.

3.

IN an Action of Debt for Rent, it was sayd by *Anderson*, If a man make a lease of years reserving rent, and the Lessee for years make a feoffment in fee of parcell of the land, the rent shall be apportioned. *Apportionment.*

Fondrin & Gowdey 3 Mysl. Pk. 383.

4.

Alien.

FEnner came to the Bar, and sayd to *Anderson*, that in his absence he had moved this case. An Alien born purchaseth Lands, and before office found, the Queen by her Letters Patents maketh him a denison, and confirms his estate, the question is, who shall have the lands? *Anderson*] The question is, if the Queen shall have the lands of an Alien before office found? *Fenner*] True, it is, my Lord. *Anderson*] I think they are not in the Queen before office, and then the confirmation is good. *Rodes*] It seemeth that he shall take it onely to the use of the Queen, and then the confirmation is voyd. *Fenner*] In 33 *lib. Ass.* is this case; If the Neise of the King purchase lands, and takes a husband who hath issue by her, and she dye, he shall be tenant by the curtesie. *Anderson* and all the Court denied that case of the Neise. *Fenner*] I have heard lately in the Exchequer, that an English man and an alien purchased lands joyntly, and the alien dyed, it was adjudged that the other should have all by surviving. *Anderson*, and all the Court] Surely this cannot be Law; for it is a maxim, *Nullum tempus occurrit Regi*. *Peryam*] If the Freehold be in the Alien untill office found, if a trespass be committed, who shall punish it? for he shall have no Action. *Fenner*] That is true; and so it is of a Monk if he be a disseisor, and yet the freehold is in him. *Shuttelworth*] And so it is of a person atteinted, and yet before office found the freehold is not in the Queen. *Rodes*] It is, *Dyer* 11 *Eliz.* fol. 283. If a man enfeoffee an Alien and a Denison to his use, that the Queen shall have the moity, whereby it seemeth that the confirment is voyd. *Anderson*] I hold this rule for certain, that in every feoffment there is feoffer and feoffee; and if there be a feoffee, he must of necessity take, wherby I think the confirmation is good. *Rodes*] Is this case hanging in this Court. *Fenner*] No, Sir. *Windham*] Wherefore then doe you move it in this Court? And afterwards the

Neif purchase lands.

Joynt purchase by an alien.

Trespass.

Monk.

Atteynted person.

Feoffment to use.

 question

queſtion being demanded of *Shuttelworth* by divers Barriſters, he made anſwer; Truly in my opinion it is not in the Queen before office found, and therefore I think the confirmation is good. *Quare.*

5.

Miſdemeanner. AN Attorney of the Common Pleas brought an action of debt againſt another, whereupon he was arreſted in the Country, and when he came to *London*, the Attorney cauſed him to be arreſted in *London* for the ſame debt, and this was ſhewed to the Court, and the Attorney called, to whom *Anderſon* ſaid, if a man be ſued here for a debt, and after be arreſted in another Court for the ſame debt, the penaltie is fine and impriſonment, and that is both the law and the cuſtom of this Court, wherefore then have you done this? ſurely we will ſend you to the Fleet for your labour. Attorney] I beſeech you, my Lord, conſider my eſtate. *Anderſon*] I have well conſidered it, and that is, that you ſhall goe to the Fleet, and therfore Warden of the Fleet take him to you. *Windham*] We will puniſh ſuch groſs faults in you more ſeverely than in others, becauſe you are an Attorney here, and your fault is ſo much the greater, by how much you are skilful in the law and cuſtoms of this Court, wherefore you ſhall goe to the Fleet.

De Term. Mic. Anno xxix. Eliz.

1.

Annuity. IN the caſe of *Sellenger*, it was ſaid by *Anderſon*, and agreed by the Court, that if a man grant an Annuity out of Land, and hath nothing in the Land, that yet this ſhall be good to charge the Grantor in a Writ of Annuity; and in the ſame caſe it was alſo agreed by the Court, that if a man grant an Annuity to a Woman, who takes a Husband, and after Arrerages do incur, and the Wife dye, ſo that the Annuity is determined, that the Husband ſhall have an Action of debt for the Arrerages, by the Common Law. *Shuttleworth*] This is not remedied by the Statute of Arrerages of Rents, and then at the Common Law it is but a thing in Action. *Peryam*] An Annuity is more than a thing

thing in Action. *Windham*] He may grant it over, and ſo the opinion of the whole Court was, that debt was maintenable.

2.

AT the ſame day it was ſaid by *Anderſon*, and not gainſaid, that if an Executor plead *ne unq; adminiſter come executor*, yet afterwards he may take the Adminiſtration upon him, and well enough be Executor. *Executor.*

3.

IN a Replevin by *Boſſe* againſt *Hawtrey*, they were at Iſſne, *Termino Mic. An.* 28. & 29. And *Boſſe* had a *venire facias* in *Termino Mic.* retournable in *Termino Hill.* and after in *Termino Hill.* took an *alias* retournable in *Termino Paſch.* and ſo awarded it in the Roll of *Mic.* to the intent that the matter ſhould not be tried at the Aſſiſes in Kent, and thereupon *Hawtrey* which was Avowant, moved the Court and prayed expedition, whereupon the Court cauſed the Roll to be brought in, and notwithſtanding that it was a Roll of *Mic.* Term, yet becauſe it was awarded the ſame Term, they mended the Roll, and awarded the *alias* retournable the ſame Term of *Hill.* *Triall by proviſo.*

4.

WYlgus brought an Action of Treſpaſs againſt *Welche quare clauſum fregit. Welche* ſaid, that *I. W.* was ſeiſed and enfeoffed *May*, and ſo conveyed a title to himſelf, the Plantif replyed that *A.* his Aunceſtor was ſeiſed, and ſo the Land deſcended to him, *Abſq; hoc* that *I. W.* was ſeiſed, and upon this Iſſue the Court was moved. *Anderſon*] the ſeiſin is not traverſable, but where it is materiall, and therefore clearly the Traverſe is not good; but *Fenner* cited a book in 2. *Edw.* 6. that the Travers ſhall be good, but he ſtood not much upon it. *Snagg* 27 *Hen.* 8. 4. *Bro.* [*pleadings*] 1. is contrary, but the opinion of all the Court clearly was that the Travers is not good. *Travers.* *Trin.* 28. Eliz. rot. 537.

5.

A Man makes a Feoffment in Fee to the uſe of himſelf and his Wife, *& alterius eorum dintius viventis abſq; impeticione vaſti durantibus vitis ipſorum*, the Husband dies, if the Wife ſhall hold without impeachment of waſt or no was moved by the Serjeants. And the opinion of all the Court was, that ſhe ſhall not be impeached of Waſt, becauſe of the ſeverance, but otherwiſe if it had been Joyntly. *Vaſt.*

6. *Fulwood*

6.

Action upon he case.

Fulwood brought an action upon the case against *Fulwood*, and declared that whereas a motion of mariage was between the Defendant and a Widow in *London*, in consideration that the Plaintif should give his assent, that the Father of those *Fulwoods* should convey to the Defendant all his Lands and Chattells, the Defendant promised to pay the Plaintif such a sum of money as their Father should assign. & *Ac licet* that the Plaintif had given his consent, and that their said Father had assigned him to pay 37. l. yet the Defendant, *&c.* and he pleaded *non assumpsit*, and it was found for the Plaintif, and now *Fenner* spoke in arrest of Judgement for four causes. First there is no consideration, for the declaration is *assensum suum daret*, so that he is at liberty to give his assent or no: and so no perfect consideration. The second is *ac licet* the Plaintif, *&c.* and doth not say *in facto* that he gave his assent. The third is, that he doth not say that he gave his assent when the Father had those Lands and Chattells. The fourth is, that in consideration the conveyance should be made to the Defendant, and it appeareth that it was made to the Defendant and his Wife. *Shuttleworth*] To the contrary, we have alleged in deed, that he gave his assent, and that is as much as if he had said in consideration that he gave his assent. And allthough that the conveyance be to both, yet it is in tayl to them, and so the inheritance given to both. And therefore that which you allege is against you. And the Wife of the Defendant being in Court was very importunate, whereupon the Court moved an agreement, and the Plaintif was content upon condition that the Defendant would enter into bond, but the Defendant seemed unwilling by his silence. *Anderson*] Wee have made stay to the intent to do the Defendant good, and he will not be content when more than reason is offered him, wherefore let Judgement be entred for the Plaintif.

1.
2.
3.
4.

7.

Revocation of a Vill. Norfolk Trin. 28 Eliz. rot. 2150.

IN a replevin by *Gybson* against *Platlesse*, the Defendant made Conusance as Baylif to *Anne Wingfield*, and the Issue was whether the Land descended to *Anne Wingfield*, as Daughter and Heir to *I. W.* and upon evidence this was the case. The said *I. W.* was seised of the Lands in question, and divers other Lands, and by his last VVill devised all his Lands and Tenements to *Anthony Wingfield* of *London* Goldsmith in Fee; and after and before his death, he made a Feoffment in Fee of the same Lands which he had devised to the same *A. W.* and when he sealed the Feoffment he demanded, will not this

hurt

hurt my Will, and it was anſwered again that it would not, and he ſaid, if this will not hurt my Will, I will ſeal it, and then he ſealed it, and a Letter of Attorny to make livery, and in ſome of the Lands the Attorney made livery, but not of the Lands now in queſtion, and after the Teſtator died, now if the Deviſee ſhall have the Lands or no, was the queſtion; for if this Feoffment be Revocation of the Will, then the Deviſe is void. And it was ſaid by the Counſell of *Anne VVingfield*, that it is a Revocation. For if the Teſtator had ſaid that this ſhall not be his Will, then it had been a plain Revocation, *quod fuit conceſſum per Curiam*, and then the making of the Feoffment is as much to ſay, as that the Will ſhall not ſtand: but it was anſwered by the Court, that it appeared that the mind of the Teſtator was, that his Will ſhould ſtand, and when he made the Feoffment this was a Revocation in Law, and if no Feoffment had been made, there had been no Revocation in Law, and there is no Revocation in deed, for he ſaid if this will not hurt my Will, I will ſeal it, and allthough that the Attorney made livery in part, ſo that the Feoffment was perfect in part, yet for the Lands in queſtion, whereof no livery was made, the Will ſhall ſtand, for a Will may be effectuall for Part, and for Part it may be revoked, and the Court told the Jury that this was their opinion, and thereupon the Jury found accordingly, that the Land did not deſcend to *A. VV.* *quod nota*. And *Fenner* who was of Counſell with the Plaintif, before the coming again of the Jury to the Bar, ſaid to the Counſell of the Defendant, that the Law was clear againſt them. Allſo he ſaid to divers Barreſters afterward privately, that in the caſe of Serjeant *Jeofres* it was adjudged, that where one had made his Will, and after one of his friends came unto him, and demanded of the Teſtator if he had made his Wil, and he anſwered no. And he demanded again, will you make your Will, and he anſwered no, and yet this was adjudged no Revocation.

Feofment perfect in part.

Will.

8.

ONe *Lea* of *Eſſex*, was ſued in an Action of Battery in the Common pleas, and upon *non culp.* pleaded, it appeared upon the evidence, that the Defendant and others had thrown daggers at the Plaintif, and grievouſly hurt and maimed him in outragious manner, and *Peryam* ſaid to the Jury that they ought to conſider, that the Plaintif was put in fear of his life, and had one of his hands maimed, and what damage he had ſuſteyned by his Mayhem, and that they ought to give damage as well for the fear and aſſault as for the Mayhem, and when the Jury was gone from the Bar, the Defendant cauſed the Plaintif to be arreſted in the Kings Bench, for a battery done to him by the Plaintif before, and this was ſhewed to the Court, and

Privelege. Battery.

thereupon they ſent for *Lea*, and were grievoſly offended with him, for they ſaid that when a man is ſued here, he ought ſafely to come and go by the privilege of this place without vexation elſewhere. And *Lea* pleaded that he was ignorant of the Law, but the Court anſwered that *ignorantia juris non excuſat*, and therefore they ſaid that they would puniſh him, and diſcharge the other. Then the Plaintif ſaid that he had put in bayl to the arreſt, and the Court anſwered, if you had not done ſo we would have diſcharged you, but now we cannot, but they commanded *Lea* to releaſe his arreſt, or otherwiſe he ſhould ſmart for it, and *Lea* was well content to do ſo. *Anderſon*] yet you ſhall pay a fine here allſo, for otherwiſe we ſhall be perjured, wherefore becauſe you are ignorant, you ſhall be fined at vj. ſ. and *Lea* payed the vj. ſ. incontinently, and went for to releaſe his arreſt. *Rodes*] You have eſcaped well, therefore let this be a warning.

Privelege de Court.

Fine.

9.

Copyhold Mich. 27. & 28. Eliz. Rot. 1858. Radford.

BEtween *Smyth* and *Lane* the caſe was ſuch. *A.* was a Copyholder in Fee according to the cuſtom of a Mannor, whereof the Queen was Lady. And ſhe by her Letters Patents let the Copy hold to *B.* for years, and he granted his Term to the Copyholder, if by this the Copyhold be determined or no was the doubt. And it was agreed by the Court and all the Serjeants, that if the Leaſe had been made immediately from the Queen to the Copyholder, then it had been a plain determination, but ſome put a diverſity becauſe the Patentee was not Lord of the Mannor, *Peryam*] I think the Copyhold is not gone, for when the Copyholder hath an intereſt in poſſeſſion, and the other in the Freehold, and the Patentee grants his intereſt to the Copyholder, what ſurrender can this be? *Anderſon*] I will not have it a ſurrender, but I will have his intereſt to be determined. For when he is a Copyholder, this is by Cuſtom, and when the Land is left, this is by the Common Law, and when this is granted to the Copyholder, ſurely he ſhall not have both. For he cannot have a Copyhold in the Land, and have the Land alſo, wherefore in my opinion the Copyhold is gone. *Peryam*] Peradventure by the grant to the Patentee the Rent ſhall paſs if there be any, but it ſhall be hard to make it a determination of the Copyhold, for they are two diſtinct and two ſeverall intereſts. *Anderſon*] By the grant made to the Patentee the Rent ſhall not paſs, for he hath no Reverſion. *& adjornatur.*

28 H. 8 30. b.

10. *Quare*

10.

A *Quare impedit* was brought by *Specot* and his wife againſt the Biſhop of *Exeter*, and declared how *A. F.* was ſeiſed of the Mannor to which the Advowſon is appendant, and preſented, and deviſed the Mannor to his wife now one of the Plaintifs, and ſhe after took to husband *Specot*, and then the Church became voyd, and they preſented their Clerk, and the Biſhop diſturbed them. The Biſhop pleaded that he claims nothing but as Ordinary, and that the Church is with cure of ſoules, and confeſſeth the title of the Plaintif: And that they preſented, but he alleged in bar, that he examined their Clerk, and upon the examination, *Invenit eum fore ſchiſmaticum inveteratum*, ſo that by the Law of holy Church he could not admit him. Whereupon the Plaintif demurred in Law. *Shuttelworth*] The Plaintif ought to recover. Firſt, I agree, that if it had been alleged in certain wherein he had been a Schiſmatick, this had been a ſufficient plea to excuſe him, but as this is, it is otherwiſe. For a Schiſmatick is he which divides and ſeparates himſelf from the Religion and the Faith eſtabliſhed. But this plea is inſufficient for the uncertainty, and therefore in 38 *H.* 3. fol. 2. *Fitzh. Quare imped.* 124. The Earl of *Arundell* brought a *Quare impedit*, and the other ſayd, that he preſented one to him who was perjured for certain cauſes, and ſhewed for what, whereby he was not a perſon capable, and ſo it ſhould be in this caſe; and in 12 *Eliz. Dyer* fol. 293. he ought to ſet down the diſability of the Clerk, and give notice to the Patron. And alſo in *Dyer* 9 *Eliz.* fol. 254. the Biſhop refuſed the Clerk becauſe he was a haunter of Taverns and unlawfull Games, *&c. Et ob ea & diverſa alia crimina fuit criminoſus & inhabilis*, *&c.* And there the Plea was thought not good, becauſe that the faults alleged were not evill in their own nature, but by the prohibition of the Law. And alſo the Plea was naught, becauſe he had not ſhewed what the other faults were. And the reaſon wherefore the Ordinary ought certainly to allege what faults the Preſentee hath, is, becauſe the Patron may preſent another unto him who is not infected with the ſame faults, and how can the Patron tell that his Clerk is diſabled for ſuch a fault, when he doth not know certainly what the fault is? Then if the Plea of the Ordinary be inſufficient, whether he ſhall be a diſturber by his evill Plea, and it ſeemeth that he ſhall; for ſo is the Book in 14 *Hen.* 7. fol. 21 *b.* & 5 *Hen.* 7. 20. Alſo for another reaſon the Plea is not good, for it is too general for the trial; and all though that it may be ſayd that it ſhall not be tryed by a Jury, but by the Metropolitan, as perchance it ſhall be, yet it is too generall; for how can he know wherein he is a Schiſmatick, ſo that he may examine him thereof? as in Raviſhment of Ward, ſuppoſing that the Infant

Paſch. 28 *El.* rot. 2095.

Certainty.

Schiſmatick.

Perjury.

Notice of diſability certain.

Tavern and gaming.

Evil in it ſelf.

Evil forbidden.

Diſturber by evil pleading.

Triall.

Raviſhment of a Ward.

12 *H.* 8. *f.* 6. *a.* *f.* 11. fant holdeth of him by Knights ſervice, it muſt be ſhewed in certain by what ſervice: And allſo in the caſe of *Winbiſh* the Plea was not good, becauſe he did not ſhew in certain how ſhe was heir to the other; and ſo I think the Plaintif ought to recover. *Walmiſley* to the contrary: And it ſeemeth the Plaintif ſhall be barred; Firſt, when a Parſon is preſented to the Biſhop it appears fully that the examination of him appertains fully to the Biſhop, as it is expreſſed in the Statute *De Articulis Cleri, de ideoneitate perſonæ preſentatæ ad beneficium Eccleſiaſticum pertinet examinatio ad judicem eccleſiaſticum, & ita hactenus uſitatum eſt, & fiat in futurum.* For the cure of the Parſon is the cure of the Ordinary, as it is expreſſed in 32 *Hen.* 6. He ſhall ſay to him, *Accipe curam tuam, & curam meam.* Then if we ſhall be driven to ſhew wherein he is a Schiſmatick, and I think not; for the Book of 38 *Ed.* 3. fol. 2. which is vouched againſt me, is with me; for there he ſhewed before what Judge he was perjured, which is very neceſſary; for if it be not before a Judge it is no perjury; but there he did not ſhew wherein he was perjured: Allſo he ſayd, that in 12 *Eliz.* in the Biſhop of *Norwich*'s caſe, the opinion of *Walſh*, that thoſe things which touch the manners of the Clerk, ſhall be tryed by the Temporall Court, but that which toucheth the learning or ſufficiency of the Clerk, ſhall be tryed by the Spirituall Court. And in vain it ſhall be to allege wherein he is a Schiſmatick; for this Court cannot judge of it, in proof whereof he cited the Statute of 2 *Hen.* 8. And he defined a Schiſm to be *Recens diſſentio congregationis jure aliquo*, but an Heretick is he which hath a habit therein, and is inveterate; ſo he concluded, that *Schiſmaticus inveteratus eſt Hæreticus, & Hæreticus eſt Schiſmaticus inveteratus*; and he defined *inveteratus* to be, *qui eſt multi & veteris uſus in malitia.* And if the Biſhop had ſayd that he was an Heretick, he ſhould not need to ſhew wherein, and for that he cited the caſe in 9 *Edw.* 4. 24. *Bro. Depoſition* 5. Where a Depoſition of *A.* was pleaded, there he ought to ſhew before what Judges he was depoſed, but not wherein. And what is the reaſon that he muſt ſhew before what Judge it was? Surely, becauſe this Court may know to what Court to write; and allſo the caſe in 11 *Hen.* 7. fol. 8. *Bro.* 9. of the Union of *Wamborough*, where it is pleaded, that *concurrentibus hiis, &c.* and allſo he cited 8 *Ed.* 4. 24. where a divorce was pleaded, *cauſa conſanguinitatis prout patet in recordo*, and yet well: And allſo he cited the opinions of *Fitzherbert* and *Sheiley*, 27 *Hen.* 8. 14. that an Action upon the caſe doth not lye at the Common Law, for calling one Heretick, becauſe the Judges at the Common Law cannot diſcuſs it, and he granted the caſes put by *Shuttelworth*, that where the matter is iſſuable, there it ought to be certain, but not as this caſe is where it ſhall not be tryed by a Jury; And that which hath been ſayd, that the

Examination.

Perjury.

Manners, Learning, difference.

Schiſm.

Heretick.

Depoſition.

Heretick.

Matter iſſuable.

Archbiſhop

Archbiſhop cannot examine him, becauſe he knoweth not wherein he was a Schiſmatick; this is not ſo, for the Biſhop which accuſeth him may inform the Archbiſhop, ſo that he may be well adviſed thereof, and ſo I think judgment ſhall be given againſt the Plaintif. *Anderſon*] I doubt if the Writ be wel brought in the name of the Huſband and Wife: For if the Husband have an Advowſon in right of his Wife, and the Church become voyd, and the Husband dye, the Executors ſhall have the preſentation; and the Serjeant ſayd that there be many Books in that point. *Anderſon*] I know it well, but I doubt of the Law in the caſe. Allſo I would have you to argue if this be within the Statute of Demurrers, in 27 *Eliz.* For if this be not matter of ſubſtance, then it ſhall goe hard with the Plaintif; therefore let it be argued again another time.

Advowſon in right of the wife.

II.

ONe *Brook* was Plaintif in a Replevin, the Caſe was ſuch: *Tho. Speek* was ſeiſed of a Mannor, in which were Copyholds according to the Cuſtom, and the place in which the taking was ſuppoſed, was a Copyhold; and the ſayd *Tho. Speek* being ſo ſeiſed, took to wife one *Anne B.* and died ſeiſed, after whoſe death the ſayd *A.* in the time of King *Edw.* 6. demanded the third part of the Mannor for her Dower, by the name of *Cent. Meſſuagiorum, Cent. Gardinorum, tot acr. terræ, tot acr. prati, &c.* and was endowed accordingly of parcel of the Demeſns, and parcel of the ſervices of the Copyholds, and after ſhe granted a Copyhold, and if this be good was the queſtion; for if ſhe had a Mannor the Grant was good, and otherwiſe not. And the opinion of all the Court clearly was againſt the Grant; for when ſhe demanded her Dower, ſhe was at liberty to demand the third part of the Mannor, or the third part of *Cent. Meſ. Cent. Gard. Cent. acr. &c.* and when ſhe demanded it *per nomen Cent. Meſ. &c.* ſhe could have no Mannor: For a Mannor cannot be claimed except by his name of Corporation, as *Anderſon* termed it, and not otherwiſe; and then *Cent. Meſ.* and *Cent. acr. &c.* cannot be ſayd a Mannor; aud then the Grant of a Copyhold by her which had no Mannor was utterly voyd; and this was the opinion of the Court clearly. *Quod nota.*

Copyhold.

Mannor a corporation.

12.

SHuttelworth ſhewed how one *Knight* was Plaintif in a Replevin, and they were at iſſue upon a preſcription for Common in *Newton* appendant to land in another place, and the venue was of *Newton* onely, and it was found for the Plaintif, and he prayed his judgment, for the tryall may be in the one place as well as in the other,

Viſne.
30 *Aſſ. pl.* 42.

Annuity.

as in annuity where the seisin is alleged in one County, and the Church in another, it may be tryed in any of the Counties. *Anderson*] But we think otherwise, for it ought to be of both places, when the matter ariseth in both; and if they had been in severall Counties, the Counties ought to have joyned. *Shuttelworth*] So is 10 *Ed.* 4. fol. 10. But our case being after a verdict, I think we ought to have judgement. *Anderson* and *Windham*] The verdict doth not amend the matter, if it be mis-tried, as this case is. *Rodes* agreed that it was a mis-triall, and therefore evill, and that mis-trialls are not helped by the Statute of Jeofayles. *Shuttelworth*] I agree to that, if you say that the triall is not good. *Windham*] So we say. Then *Shuttelworth* advised his Client to take a new *Venire facias*.

Counties joyn.

Mis-trial.

New Venire facias.

13.

The Lord Comptons *case.*

Prescription for Common.

WAkefield brought a Replevin against *Coffard*, who avowed for damage fesaunt. and the Plaintif prescribed for Common, that all the inhabitants of *Dale*, except the Parson and infants, and such a house, have used to have Common in the place. The Avowant sayd that the house whereunto the Plaintif claimed Common, was built within thirty yeares last past, and if he may have Common to this new house by prescription or no was demurred in judgement in *Michaelmas* Term, and then *Shuttelworth* argued for the Plaintif that he should have his Common by prescription, but not of common right. And *Gawdy* argued for the Avowant, that the Plaintif shall not have Common, because the prescription is against all reason, that he should have Common time out of mind to that which is but of thirty years continuance: And allso he excepteth the Parson, and infants, and such a house, and by the same reason he may except all, which is not good. Then one of the Judges sayd that if this be good, hereafter there shall be no Common for the ancient inhabitants. *Peryam*] By such a prescription he shall for ever barre the Lord from improving any Common, which is no reason. *Anderson*] All Common is intire; for if a man have Common to three Mesuages, and he infeoffee one man of one Mesuage, and another of the second, and another of the third, the Common is gone. And by this reason allso the new house cannot have Common. And now this Term *Gawdy* demanded of the Court if they were resolved in the poynt. *Anderson*] We are all agreed that the prescription is utterly voyd; for it is impossible to have Common time out of mind for a house which was built within thirty yeares, and then he commanded to enter judgement, if nothing were sayd to the contrary by the next day. *Shuttelworth*] We have sayd all that we can say,

Antient inhabitants. Improvement. Common entire,

my

my Lord. *Anderſon*] Then let judgment be entred againſt the Plaintif.

14.

Snagg ſhewed how the Earl of *Kent* had brought an action of debt againſt a Londoner for rent behind, and ſhewed how the Counteſs of *Derby* was tenant in Dower of this land, and took to husband the Earl of *Kent*, and that *Henry* Earl of *Derby* had granted it to the Earl of *Kent habendum* after the death of the Counteſs for certain yeares, and he ſhewed how the grant was made by the name of a reverſion alſo, and that the Tenant had attorned, and alleged the death of the Counteſs. And the Court ſaid that the Attornment is not neceſſary, for it is but a leaſe in reverſion, and then no rent paſſeth thereby. *Anderſon*] If you had been privy to the caſe of *Talboys* in the Kings-bench, you would not have moved this doubt. *Peryam*] It is alſo the very caſe of *Throckmorton* in the Commentaries. *Snagge*] But here in my caſe he hath granted it by the name of the reverſion alſo, and then the reverſion will carry the rent. *Curia*] Then is your grant voyd; for a man cannot grant his reverſion, *habend.* after the death of another; and therefore, *quacunque via data*, you ſhall have no rent. And thereupon *Snagge conticuit cum rubore.*

Grant.

Leaſe in reverſion, Grant in reverſion, difference.

15.

Ounſay was Plaintif in debt upon an obligation againſt *Hylyard*, and the Defendant pleaded the Statute of Uſury, becauſe it was made for the ſale of certain Copperas, and he took more than was limited by the Statute, and that it was made by ſhift and cheviſance, and other matter he alleged to prove it within the Statute; the Plaintif replyed, that it was made upon good conſideration, and traverſed the delivery of the Copperas, which was an evill iſſue clearly, and it was found for the Plaintif, and this was alleged in arreſt of judgement, and yet for that there was an iſſue tryed, although it was miſ-joyned, the exception was diſallowed, and judgement was given for the Plaintif.

Jeofayle.

Iſſue miſjoyned.

16.

AN Action of Debt was brought upon the Statute of Purveyors, becauſe he had cut down Trees againſt the form of the Statute of 5 *Eliz.* The Defendant pleaded not guilty, and it was moved that this was an evill iſſue; for he ought to have pleaded *nil debet*; and the Court commanded him to plead *nil debet*.

Iſſue.

17. *Walmiſley*

17.

Ayd prier. W *Almiſley* ſhewed how the Lord *Anderſon* is Plaintif in an Action of Treſpaſs againſt *Wild*, who was Tenant for life, and they were at iſſue, and the *Venire fac.* iſſued in *Michaelmas* Term, and now this Term the Defendant prayed in ayd, which he ſayd he ought not to doe, becauſe they have ſurceaſed their time; for they ought to pray it when the *Venire facias* is awarded, or otherwiſe they ſhall not have it; and he cited for that purpoſe 15 *Edw.* 3. And the Court was of the ſame opinion, that he ought then to pray it, or not at all.

18.

Forfeiture. A Writ of Error was brought upon a judgement given in *London*, and this was the caſe; Sir *Wolſtan Dickſey* Alderman, brought an Action of Debt in *London* againſt Alderman *Spenſer* for rent behind upon a Leaſe for years made to *Spenſer* by one *Bacchus*, who afterwards granted the reverſion to *Dickſey*, and the Tenant attorned, and the rent was behind, *&c.* *Spenſer* pleaded in bar, that before the grant of the reverſion to *Dickſey*, *Bacchus* was ſeiſed, and ſhewed the cuſtom of *London*, to make inrolments of deeds indented, and then ſhewed that before the bargain to *Dickſey*, he bargained the reverſion to him by paroll, and ſo demanded judgement, *ſi actio, &c.* and this plea was entered upon record, and hanging this ſuit, *Dickſey* entred into the Land for a forfeiture of the term, becauſe he had claimed a Fee ſimple, and *Spenſer* re-entered with force, and his ſervant with him, but not with force, and thereupon *Dickſey* brought an Aſſiſe of freſh force againſt them in *London*, and all this matter was there pleaded, & adjudged that it was a forfeiture of the term, & the Jury gave damages, and the Court increaſed them, and the judgement trebled as wel the damages increaſed as the others, and alſo the

Increaſe of damages. Judgement was *quod prædicti defendentes capiantur, &c.* and thereupon *Spenſer* brought a Writ of Error, and aſſigned Error in the point of the Judgment, becauſe it was no forfeyture. And alſo becauſe the Damages increaſed by the Court were trebled. And alſo becauſe the judgment was *Capiantur* where but one was a Diſſeiſor with force, & therfore it ſhould be *Capiatur. Shuttleworth*] There is no forfeyture made

Waſt. by this Plea before triall had thereof. For if in *Waſt* the Defendant ſay that the Plaintif hath granted over his Eſtate to another, this is no forfeyture, ſo in *Cleres* caſe, if he ſay that another is next Heir,

Quid juris clam. this is no forfeyture. And in 26 *Eliz.* here was a caſe in a *quod juris clamat*, the Defendant pleaded an Eſtate tayl, and after at the Aſſiſes, he

he confeſſed but an Eſtate for Life, and yet this was no forfeiture. *Curia*] None of us do rememember any ſuch caſe here. *Walmiſley*] Surely the caſe is ſo, and I can ſhew you the names of the parties. *Anderſon*] I will not believe you before my ſelf, and I am ſure that I never heard of any ſuch caſe. *Peryam*] If any ſuch caſe had been here we would have made a doubt therof, for there are Authorities againſt it, as in 8 *Eliz.* & 6. *R.* 2. *Pleſingtons* caſe. *Shuttleworth*] Allſo they have ſaidthat the freſh force was brought *infra quarentenam, ſilicit quadraginta ſeptimanas*, and the *quarentena* is but 40 dayes. *Curia*] That is no matter, for the *ſilicet* is but *ſurpluſage*, and ſo no cauſe of Error. *Shuttleworth*] If a man diſſeiſe another without force, he ſhall not be taken and impriſoned, and therefore for this cauſe the Judgement is erroneous, and allſo the coſts encreaſed are trebled, and therefore erroneous, and cited 22. *Hen.* 6. 57. *Anderſon*] In an Action of Treſpaſs, If the Defendant pray aid of a ſtranger, this is a forfeiture, and if it be counterpleaded, yet it is a forfeiture, then ſhall the deniall thereof make any change in the caſe? ſurely no, in my opion. And I ſay that Acts which come from himſelf are forfeitures, but Collaterall Acts, as in the caſe of Waſt are not. *Walmiſley*] In 22 *Ed.* 3. 13. the Tenant ſaid that the Grantor hath releaſed unto him, the Judgement ſhall be but that he ſhall Attourn. And allſo he cited 3 *Ed.* 3. & 33 *Ed.* 3. & 18 *Ed.* 3. & 36 *Hen.* 6. & 34 *Hen.* 6. fol 24. to prove that it ſhall not be a forfeiture before triall. *Anderſon*] If one who hath no Reverſion, bring a *quid juris clamat* againſt Tenant for life, this is a forfeiture of his Eſtate, and as you have ſaid, if in VVaſt the Tenant plead the Feoffment of the Plaintif, or *non dimiſit*, true it is that theſe are no forfeitures, for you know well enough that a Feoffment is no Plea, and then it is void, and to ſay *non dimiſit* is no forfeiture. *Peryam*] The Judgement given in *Pleſingtons* caſe is not well given, for it ought to have been, *quod pro ſeiſina ſequatur ſi volunt.* as in the caſe of *Saunders* againſt *Freeman*, and he cited 10 *Edw.* 3. fol. 32. to that intent. *Wyndam*] The doubt which I conceive is for that he pleads a cuſtom in *London* for the inrollment of Deeds indented, and he ſheweth that his bargain was by parol, and therefore void, and then no forfeiture, as if in Treſpaſs a man prays ayd, as by the Leaſe of *I. S.* and in the concluſion prayes aid of *I. N.* this is void. *Anderſon*] Allthough that it be ſo, yet the pleading is, that he bargained the Reverſion, and then this is good by parol in *London*, therefore there is no doubt in that point. *Walmiſley*] The Books in 15 *Ed.* 2. & 25 *Ed.* 3. Import that Judgement ought to be given before any forfeiture can be. *Curia*] Without doubt he may take advantage thereof before Judgement, as well as after, if the plea be entred upon record. *Wyndam*] For the point of *capiantur*, the Book is in 2. *lib. Aſſ. Pl.* 8. *Br. impriſon.* 30. & in 9. *lib. Aſſ.* & 12. *lib. Aſſ. Pl.*

Quarentena. Scilicet a ſurpluſage.

Aydin Treſpaſs.

Proper acts, Collaterall. Difference,

Quid juris clamat.

Praying in ayd.

Forfeiture before Judgement.

Preſent Diſſeiſor, abſent, Difference.

Preſent.

33 *Br. impriſon.* 40. *Anderſon*] Two may be Diſſeiſors, and the one with force and the other not, as if I command one to make a Diſſeiſin, and he makes a diſſeiſin with force, and allſo if one enter with force to my uſe, and after I agree, he is a Diſſeiſor with force and I am not ſo, and thoſe caſes will anſwer the Books of Aſſiſes, for in thoſe caſes they were preſent, but in theſe not, and ſo I hold that he which is preſent when force is made, is a Diſſeiſor with force. Then it was moved if the Statute of 8 *Hen.* 6. doth extend to freſh forces. *VVyndam*] It doth extend to them by expreſs words, and *Fleetwood* cited a caſe in 44 *Edw.* 3. 32. that an Attaint lieth of freſh force. Then for the other matter of trebling of damages increaſed, the Court made no doubt but that they ſhall be trebled, and they ſaid that ſo it was lately adjudged here in a caſe of *Staffordſhire*.

19.

Challenge.

Puckering ſhewed how an Attaint was brought upon a falſe Oath made in a Replevin, where the Defendant made Conuſance as Bayley to one *Huſſey*, and in the Attaint ſurmiſe was made that the Sherif was Coſen to *Huſſey*, and thereupon prayed Proceſs to the Coroners, and *Puckering* moved that no Proceſs ſhould iſſue to the Coroners, for *Huſſey* was not party to the Attaint, and then this is but matter of favour, and he cited 3 *Hen.* 7. And all the Court accorded with him, that it is but matter of favour onely, and no ſurmiſe to have a Writ to the Coroners, but *VValmiſley* would have put a

Leſſee pur ans.

difference between Leſſee for years and a Bayley, for as he pretended, in the caſe of a Bayley, it ſhall be a principall challenge, but not in the other caſe; but all the Court was againſt him, and that it is no principall challenge in the one caſe nor in the other. The laſt day of the Term it was moved again, and the Court was of the ſame mind as before.

20.

Advowſon.

IN a *Quare impedit*, it was ſaid by *Anderſon*, and agreed by all the Court, that if a man make a Feoffment in Fee of a Mannor without deed, and without ſaying (with the appurtenances) yet the Advowſon ſhall paſs, and cited 15 *Hen.* 7. where it is adjudged that it is parcell of the Mannor, and lieth in Tenure.

21. In

21.

IN an Action of debt *Anderſon* cited a caſe which was before him at the Aſſiſes in *Somerſetſhire*, in an Action of Battery was brought in *London*, and a Juſtification made in *Somerſetſhire*, *abſq; hoc* that he was guilty in *London*, and the Plaintif replyed *de injuria ſua propria abſq;* ; *tali cauſa*, and *Anderſon* ſaid that a man ſhall never plead, *de ſon tort. demeaſne* : where the matter ariſeth in a Forein Country. *Pleading.*

22.

AN *ejectione firme* was brought by *Clayton* againſt *Lawſon*, the Defendant pleaded in Bar, a Recovery had in the Kings Bench againſt the Leſſor of the Plaintif. And *Fenner* moved that it ſhould be no Bar no more than in Treſpaſs. *Anderſon*] I think it to be a good Bar. For this Action is as ſtrong to bind the poſſeſſion, as a Writ of right is to bind the right. *VVyndam*] I think it is no Bar no more than in Treſpaſs. *Anderſon*] This is more than an Action of Treſpaſs, for in this he ſhall recover his Term. *Rodes*] This caſe was moved the laſt Term, and the opinion of the Court then was, that it was a good Bar. *Fenner*] True it is, if it were between the parties themſelves; but here the Plaintif is but Leſſee to him which was Barred. *Anderſon*] Allthough that it be ſo, yet he claymeth by the Leaſe of him which was Barred, and during the Leaſe of the other his Leſſor could have no right, and what ſhall he have then? *Fenner*] That which is between the parties cannot be an Eſtoppell to the Plaintif here which is but a ſtranger. *Anderſon*] I know that he ſhall not plead it by way of Eſtoppell, but he ſhall conclude Iudgement *ſi Actio. Peryam*] If in an Aſſiſe a Recovery in another Aſſiſe be pleaded in Bar, he ſhall not conclude by way of Eſtoppell, but Iudgement *ſi Actio*, and there he is driven to a higher Action, and ſo here; and the Law ſhall never have end, if after a man is Barred in his Action, he may bring the ſame Action again, therefore I think it a good Bar, and that he is driven to a higher Action. *VVyndam*] Leſſee for years can have no higher Action. *Anderſon & Peryam*] If one which hath a Leaſe for years and no more, enter upon him which hath a good title, he is a diſſeiſor of all the Feeſimple. *Wyndam*] If two claim by Leaſe from one man, and one bringeth an *Ejectione Firme*, and is Barred, what Action ſhall he have then? *Anderſon*] None, for he hath no Right. *VVyndam*] That is hard. *Anderſon*] What Action ſhall he have which is Barred in Formdone? ſurely none. *Fenner*] This is another caſe. *Anderſon*] *Aliquantulum incenſus*, truly it is a plain *Bar.* *Eſtoppell.* *Aſſiſe.* *Tenant for years diſſeiſor of tenant in Fee ſimple.*

plain caſe that he ſhall be Bared, whereunto *Peryam* and *Rodes* agreed clearly.

23.

View. IN a *præcipe quod reddat*, the Tenant demanded the view, and an *habere facias viſum* iſſued, and the Tenant came not to the Sherif to take the view, it was ſaid by the whole Court, that the Sherif may return, that none came to take the view, and he ſhall never have the view again. *Anderſon*] The *habere fac. viſum* is the ſuit of the Tenant, and then when he doth not come to take the view, this is a default, and then good reaſon to exclude him from the view. *Gawdy*] Such a return was never ſeen before, and therefore it is to be noted, the caſe was between *Hoo* and *Hoo* for Lands in *Norfolk*.

24.

Apportionment. *John Wiſeman* of the Inner Temple, brought an Action of debt againſt *Thomas Wallenger*, the caſe was this. A man ſeiſed of three acres of Land in Fee, makes a leaſe, reſerving xxx. ſ. of Rent, and after deviſed the Reverſion of two acres to a ſtranger, and the third acre deſcended to the Heir, and he brought an Action of debt for xij. d. being behind, and *Puckering* moved if they were agreed of their judgement in the caſe. *Anderſon*] If a man let two Acres of Land rendring Rent, and grant the Reverſion of one of them, all the Rent is gone, as it is in *Dyer*, and at the Common Law, before the Statute of *W.* 3. there was no apportionment, and the Statute ſpeaketh of no ſuch apportionment as this is. *Rodes*] Surely no Book in all the Law will warrant this apportionment. *Fenner*] Yes Sir, 5 *Ed.* 3. If a man have a Rent of xx. ſ. and grants parcell thereof, and the Tenant Attourns, this is good. *Rodes*] This is another caſe. But ſhew us the caſe which was in the Kings Bench againſt the next Term. *& adjornatur*, but the Plaintif ſaid then to divers Barreſters that ſuch a caſe was adjudged with him in the Kings Bench. *Paſch* xxviij. *Eliz. Rot.* 341. between *Wiſeman* and *Brewer*, and another caſe in the Common place, *London*, *Rogers verſus Hunt*, *Paſch.* 16 *Eliz. Rot.* 1544.

Rent extinct by the grant of part of the Reverſion.

25.

Vilary. A *Quare impedit* was brought by *Beverley* againſt *Cornwall*, which was the Preſentee of the Queen, and the Plaintif had Judgement to recover, and now the Queens Serjeant ſhewed that the Plaintif is outlawed, and prayed that the Writ to the Biſhop might be ſtayed, and that they may have a *ſcire facias* for the Queen, to ſhew wherefore

wherefore ſhe ſhall not have Execution of this Judgement. *Walmyſley*] This cannot be debated now, for the Plaintif hath no day in Court, after Judgement, and this is but a ſurmiſe. *Curia*] The Record here before us teſtifies that he is outlawed. *VValmyſley*] Yet it is but their ſurmiſe that he is the ſame perſon. *VVyndam*] In debt upon an Oblig: If the Plantif be outlawed, the Queens Serjeants may pray the debt for the Queen; and yet this is but a ſurmiſe. And the opinion of three Juſtices was (for *Anderſon* was abſent) that they ought to ſtay Execution, but how Proceſſe ſhall be awarded, or if a *Scire facias* ſhall iſſue againſt the Plaintif or no, they would be adviſed for the courſe thereof, but *Peryam* thought that they might have a *Scire facias* againſt the antient Incumbent.

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4. *Travers.*

A *Quare impedit* was brought by *Gerard*, and declared that his Anceſtor was ſeiſed of the Mannor, to which the Advowſon is appendent, and preſented, and died ſeiſed, and the Mannor deſcended to him, and ſo he ought to preſent, the Defendant pleaded in Bar, that the Anceſtor of the Plaintif was joyntly ſeiſed with his Wife, and that ſhe ſurvived, & for default of her Preſentation th: Lapſe accrued to the Biſhop, who did collate. *Abſq; hoc* that he died ſole ſeiſed, and it was moved by *Gawdy* that the Traverſe ſhall be naught, for he had ſufficiently anſwered to him before. And the opinion of the Court (*Anderſon* being abſent) was that the Traverſe is void, becauſe he had confeſſed and avowed him before, and cited 5 *Hen.* 7. 11. 12. *Bro. tit. Traverſe ſans ceo* 13.

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27. *Cond. impoſſible.*

B*Yngham* brought an Action of debt upon an Obligation againſt Doctor *Squire*, and the Condition was, that if the Defendant did obtein a good grant of the next avoydance of the Archdeaconry of *Staſſord*, ſo that the Plaintif might enjoy it, that then, *&c.* and the Defendant pleaded that he had obteined a good grant of the next avoydance, and in truth ſo he had, but the antient Incumbent was created a Biſhop, whereby it perteined to the Queen to Preſent, ſo that the Plaintif could not enjoy it, and therefore the Plaintif moved the Court that the Defendant ſhould amend his plea, and the Court (*Anderſon abſente*) commanded him to do ſo, for it ſeemed unto them that the Obligation was forfeit. *Gawdy* moved for the Defendant that when the Archdeacon was made a Biſhop, the avoidance perteined to the Queen by her Prerogative, ſo that it was become impoſſible, but nevertheleſs he took day to amend his Plea.

De Term. Paſch. Anno Eliz. *xxix.*

1.

THE Firſt day of this *Eaſter* Term, Sir *Chriſtopher Hatton*, Knight, late Vicechamberleyn to the Queen, and Captain of the Guard, rode from his houſe in Holborn, the Lord *Burghley* Lord Treaſurer being on his right hand, and the Earl of *Leiceſter* on his left hand, and the Gentlemen Students of the Inner Temple attending upon him, (becauſe he was one of the ſame Houſe) and with great Honor he was brought to *VVeſtminſter* Hall, and there in the Chancery ſworn Lord Chancellor of *England*, according to the Patent and Seal delivered unto him the Sunday before.

2.

Abatement. THE Queen brought a *Quare impedit* againſt the Incumbent and the Biſhop, the Biſhop pleaded that he claimed nothing but as Ordinary, and thereupon Judgement Formall was given againſt him, *ſed ceſſet executio, &c.* the Incumbent pleaded in bar, whereupon they were at iſſue, and this iſſue depending, the Incumbent died, and now *Gawdy* moved if the Writ ſhould abate againſt the Biſhop or no? and *VVyndam* and *Peryam* clearly that it ſhall abate; but if the Plaintif had averred the Ordinary to be a diſturber, then Judgement ſhould have been executed; but now he claiming nothing but as Ordinary, and thereupon Iudgement given, which is but conditionall upon the Plea of the Incumbent, it ſeemeth that the Writ ſhall abate, for there is none now to plead againſt the Queen; But if the Biſhop had been averred to be a diſturber, then it had been otherwiſe, and *Peryam* reſembled it to the caſe of 9 *Hen.* 6. where it is brought againſt the Patron and the Incumbent, and the Patron dieth, or the Incumbent, the Writ ſhall not abate againſt the other. But they commanded him to move it again, when the Lord *Anderſon* was preſent.

The incumbent dyeth.

Patron.

3.

Ejectione Firme was brought by *King* againſt *King* and others, who pleaded not guilty, and now the Jury appeared, and the Plaintif declared upon the Leaſe of one *Weſt. Gawdy* for the Defendant ſhewed that before the ſaid Leaſe, *VVeſt* had made a Leaſe for ſix yeares, ſo that during that time this Leaſe could not be good: the Counſell of the Plaintif confeſſed the ſaid Leaſe for ſix years, but ſaid further that it was ſurrendred. *VVyndam* demanded where that ſurrender was made, and it was anſwered in *London*, and the Land lay in *Eſſex*. Was the ſurrender (ſaid *VVyndam*) made in *London*, and he out of poſſeſſion, and the Land in *Eſſex*? What ſurrender call you this? And the Juſtices laughed at this evidence, and ſo did the Serjeants for the Defendant, concluding that it was not good without queſtion. And ſo the Plaintif was Nonſuite, and the Jury diſcharged incontinently. *Surrender.* *Out of poſſeſſion.*

4.

Huttleworth ſhewed how *Hurleſton* was Plaintif in an *Ejectione Firme*, and declared upon the Leaſe of one *Pinchine*, to which the Defendant ſaid, that before *P.* had any thing &c. one *E. Roberts* was ſeiſed in Fee in right of *Fayth* his Wife, and ſo being ſeiſed, made a Leaſe to the ſaid *P.* If the ſaid *E. R.* ſo long ſhould live, whereby *P.* being poſſeſſed, made a Leaſe to the Plaintif, and ſhewed that the ſaid *Roberts* was dead, and the Defendant as ſervant to the ſaid *Fayth* entred and Ejected him, now he demanded what he ſhould Traverſe in this Plea. *VVyndam*] This is a ſhifting Plea. *Peryam*] Is this Plea true? *Shuttleworth*] No Sir. *Peryam*] Then you may trice him upon this Plea, for you may Traverſe the ſeiſin in the right of his Wife without doubt, or you may Traverſe any other part thereof, and *VVyndam* and *Rodes* agreed clearly thereunto for the ſeiſin (*Anderſon abſente*) *Travers.*

5.

AN Action of the caſe was bronght upon an *Aſſumpſit*, the Defendant pleaded *non Aſſumpſit*, and the iſſue was found for the Plaintif, and now *Gawdy* ſpoke in arreſt of Judgement, becauſe the Plaintif had alledged no place of the *Aſſumpſion*, and he ſaid that when an Iſſue is miſ-tried, it hath been adjudged here that it is not helped by the Statute, and here is no place alledged, whereupon the Tryall may be. *Peryam*] The opinion of many hath been, that the Statute ſhall *Jeofayl.* *No Place of the aſſumpſion.*

ſhall be taken moſt ſtrictly, but in my opinion it ſhall be taken moſt liberally, ſo that if a verdict be once given, it ſhall be a great cauſe that ſhall hinder judgement, wherefore allthough no place be ſhewen, yet when it is tryed and found, it ſeemeth, that he ought to have judgement; and ſo was the opinion of the Court, *Anderſon abſente.*

6.

Conſideration.

AN Action upon the caſe was brought in *Staffordſhire* by *Whorwood* againſt *Gybbons*, how in an account between them, the Defendant was found in Arrerages, and in conſideration that the Plaintif *differreret diem ſolutionis debiti prædicti per parvum tempus*, the Defendant did aſſume to pay it, and upon *Non aſſumpſit* pleaded, it was found with the Plaintif, and it was alleged in arreſt of judgement, that this was no conſideration. And the opinion of the whole Court (*Abſente Anderſon*) was, that inſomuch as the Proviſo was made by him by whom the debt was due, that it is a good conſideration, and that it is a common courſe in Actions upon the caſe againſt him by whom the debt is due, to declare without any words *in conſideratione.* And allthough that *Gawdy* moved that *parvum tempus* may be three or four hours, or dayes, which is no conſideration, yet for the cauſe alleged, the Court ſayd that they ſaw no cauſe to ſtay judgement.

7.

Scandal.

AN Action upon the caſe was brought for theſe words, *Thou doſt harbour and maintain Rebels and Traitors*; and the iſſue was found for the Plaintif, and the judgement was entred by the Pregnotary; yet notwithſtanding *Walmiſley* moved the Court to have regard unto it, for the Action was not maintainable; for if a man keep Theeves, and do not know them to be Theeves, he is in no fault, and an Action for theſe words will not lye, and the Plaintif hath not averred that the Defendant ſayd that the Plaintif knew them to be Traytors. *Peryam*] The Action in the Kings-bench was, that the Plaintif kept Theeves; and there if there be no ſuch averment, the Action is not maintainable, but here is the word *Maintain*, and that word implyeth a thing prohibited, and therefore not ſufferable, and therefore I think the Action is maintainable, and by the opinion of *Windham*, *Peryam*, and *Rodes* the Action was well brought (*Anderſon abſente propter ægritudinem.*)

Maintain.]

8. An

8.

AN Action upon the case was brought by *Richard Body* against *A.* and declared that whereas *Kary Raleigh* was indebted to *Body* in 14l. and the said *A.* was indebted to *Raleigh* in 50l. in consideration that the said *K. R. allocavit eidem A.* 14l. *& promisit ei ad exonerandum eundem A. de* 14l. parcell *predict.* 50l. the Defendant did assume to pay to the said Plaintif the said 14l. and the Court was moved if this were a good consideration to bind the Defendant, And the opinion of all the Court (*Anderson absente*) was, that the Consideration was good, for that he was discharged of so much against *Raleigh*, and *Raleigh* might also plead payment of the 14l. by the hands of the Defendant. *Consideration.*

9

AN Action of Assault and Battery was brought, and the Defendant was condemned by *nihil dicit*, and a Writ to enquire of damages went forth, and then the Attourney of the Plaintif died, and another Attourney without Warrant prayed the second Judgement and Execution, if this shall be error or no it was moved by *Fenner*; And the Court gave their opinion that if in an action after Judgment the Attourney dye, a new Attourney may pray Execution without Warrant, but in this case because that he died before the second Judgement, it seemeth that he ought to have a Warrant of Attourney, for the first Judgment is no finall Judgement. And the Pregnotaries said, that if after the first Judgement one of the parties had died, the Writ should abate, *quod fuit concessum per curiam.* And also *Fenner* moved that this shall not be within the intent of the Statute of Jeofayles which speaketh of Verdicts, for this shall not be said a Verdict; whereto the Court agreed, for a Verdict is that which is put in issue by the joyning of the parties. *Assault.* *Warrant.* *Verdict.*

10

A Woman brought an action, and she [Covenanteth that she shall not do any act, to repeal, to discontinue, to be nonsuit, or countermand this action, and hanging the Writ, she takes a husband, whereby the Writ abateth. Now *Fenner* moved if she had broken the Covenant. *VVindam*] If one be bound that he shall not attorn and he make an Attornment in Law, the Obligation is forfeit without question. *Rodes*] If I be bound not to make an Assignment of such a thing, and I devise it by my will, this is a forfeiture, as it is in 31. *H.* 8. *Fenner*] there is a case in *Long* 5 *E.* 4. If one be bound *Covenant.* *Attornment.* *Assignment.*

to appear at the Seſſions, &c. and I am to make a plea in this caſe, and I would know your opinions. *VVindham*] You may plead according to the truth of your cauſe, for that ſhall not change the Law, therefore plead what you liſt.

11.

Condition. DEbt was brought upon an Obligation, the Condition was to perform Articles contained in an Indenture, and one Article was, that the Defendant Sir *William Drury* ſhould plead the generall Iſſue, or an iſſuable Plea, or ſuch a Plea *in quo ſtaret aut perſiſteret*, within ſeven dayes next enſuing. The Defendant ſayd that he pleaded ſuch a Plea, and ſhewed what, and averred that it was ſufficient, and iſſuable within ſeven dayes. The Plaintif demanded judgement if to this Plea he ſhall be received, for he appeared in *Michaelmas* Term, in which he ought to have pleaded, and took imperlance over unto *Hill.* Term. And *Fenner* ſhewed, that in truth an iſſuable Plea was pleaded, and drawn in paper in *Mich.* Term, and the Plaintif replyed, and the Defendant rejoyned, and the Plaintif ſurrejoyned, and then by aſſent in *Hill.* Term all this was waved, and an imperlance of the other Term entered for fear of a diſcontinuance; and now he would have the Obligation of five hundred pound forfeited by this. And the opinion of the Court (*Anderſon abſente*) was, that the Obligation was forfeit, for the Plea ought to have been entred of Record. *Rodes*] If one be bound in an Obligation to appear here at a certain day, allthough he do appear at the ſame day, yet if his appearance be not entred upon Record, his Obligation is forfeit. *Peryam*] If the Plaintif deny that he did not plead a ſufficient Plea, this ſhall be tryed by the Record, and how can that be, when it is not entred of Record? But the Court ſayd further, that it was hard that he ſhould have the forfeiture; and ſayd that there was great negligence, and overſight in the matter. *Peryam*] You may plead all this matter ſpecially, and how by his aſſent the Plea was waved, and peradventure his aſſent (if any thing) will help you.

Appearance entred.

12.

Eſtrepment. PArtition was brought between Coparceners, and hanging the Writ the Tenant made Waſt, and *Gawdy* moved the Court for a Writ of Eſtrepment. *Peryam*] Where you are to diſprove the intereſt of the Tenant, Eſtrepment will lye, but here you confeſs an equall intereſt in him, how then can you have it? Whereunto *VVindham* agreed; and after it was ſhewen how they were Tenants in common, whereby his motion was at an end.

13. Note

13.

NOte that in the Starchamber this Term it was over-ruled by the Lords, that if in an Action at the Common Law, a man wage his Law, allthough that he make a falſe Oath, yet he ſhall not therefore be impeached by Bill in the Starchamber; and the reaſon was, becauſe it is as ſtrong as a Tryall. And the Lord Chancellor demanded of the Judges, if he were diſcharged of the debt by waging of his Law, and they anſwered, yea. But *Manwood* chief Baron ſaid, that it was the folly of the Plaintif, becauſe that he may change his Action into an Action of the caſe upon an *Aſſumpſit*, wherein the Defendant cannot wage his Law. *Perjury.*

14.

AT another day in the Starchamber between *Hurleſtone* and *Glaſcour*, it was over-ruled by the Lords, that if a Jury at the Common Law give their verdict, allthough that they make a falſe Oath, yet they ſhall not therefore be impeached by Bill in the Starchamber: But if any collaterall corruption be alleged in them, as that they took Money, or Bribes, a Bill ſhall lye thereof well enough. And allſo in the ſame caſe it was ruled, that where *Glaſcour* had brought a Bill of Conſpirary againſt *Hurleſtone*, and others, and divers of the Jury, for that they had indicted him of Perjury, that before the Indictment be traverſed, or otherwiſe avoyded by Error, he cannot have a Bill of Conſpiracy, becauſe this ſhall quaſh the tryal at the Common Law, and ſhall prevent it. And allſo before a man be acquitted, a Writ of Conſpiracy doth not lye for him by the Law. *Conſpiracy.* *Perjury,*

De Term. Trinitat. Anno xxix. Eliz. Reg.

1.

Quare imp. THe *Quare impedit* brought by *Specot* and his Wife was moved again by *Gawdy*, and it ſeemed to him, that becauſe the Biſhop did not ſhew in what thing he was a Schiſmatick, the Plea was therefore uncertain, and ſo inſufficient, and he cited 33 *Edw.* 3. 2. & 9 *Eliz. Dyer* 254 *b. Anderſon*] If he had certainly ſhewed in what thing he was *Schiſmaticus inveteratus ut ea occaſione inidoneus ſit & inhabilis, &c.* This had been a good Plea without doubt, but as it is here, ſure it is no Plea; for it is even as if he had ſayd, that he was *criminoſus*, whereunto all the other Judges agreed. *Anderſon*] All that I doubt is, whether this be helped by the Statute of Demurrers 27 *Eliz.* For otherwiſe the Plea is inſufficient without doubt. *Gawdy*] The Statute helpeth onely matters of form, and this is the ſubſtance of his Plea, that he is a Schiſmatick. *Anderſon*] Allthough it be the ſubſtance of his Plea, yet it is but form to plead it certainly. And if one demur generally to a double Plea, it is not good at this day, and ſo here. And ſo was the opinion of *Peryam*, and the other Juſtices by their ſilence ſeemed to agree thereunto, yet they gave day to the Serjeants to argue this matter. And *Peryam* ſayd that he would help the Plaintif in the beſt ſort that the Law would ſuffer him; for the Biſhops are grown ſo preſumptuous at this day, that they will make queſtion of all the Patronages in the Realm, and if it be againſt their pleaſure, none ſhall have his Preſentation. And allſo now *Anderſon* was agreed that the Action was well brought in the name of the Husband and Wife, allthough he had once moved to the contrary. Allſo in this caſe it was moved, that by the Demurrer it ſhall be confeſſed, that the Plaintif Clerk was a Schiſmatick: Whereunto *Anderſon* ſaid, that if a thing be ſufficiently alleged, it is confeſſed by the Demurrer, but otherwiſe not.

Double plea.

Demurrer is a confeſſion but of things ſufficiently alleged.

2.

Replevin. Of his own wrong.] A Replevin was brought by *Brode* againſt *Hendy*, the Defendant made Conuſance as Baylif to the Queen for Rent behind, whereunto the Plaintif ſayd, *De ſon tort demeaſne ſans tiel cauſe*, and the Cou

Court was moved whether this be a good Plea, and by the opinion of three Judges it is no Plea in a Replevin (*Anderſon abſente*) but in Treſpaſs it is good, notwithſtanding that it was objected at the Bar, that there is a diverſity in our books taken, that when the Action is brought againſt the Baylif, there it ſhall be a good Plea, but not againſt the Maſter. But the Court over-ruled it; for in a Replevin he ought to make a title.

3.

THe Queen brought a *Quare impedit* againſt the Biſhop and *Thomas Leigh* Incumbent, and they both pleaded ſeverally ſpeciall Pleas, and ſo it depended, whereupon *Fenner* ſhewed the Court that the Queen did not proſecute the Suit, but let it depend ſtill, and therefore he prayed that ſhe might be called Nonſuit: But all the Court, and the Pregnotaries ſaid, that the Queen cannot be Nonſuit. *Fenner*] Shall we then which are Defendants always be delayd? *Peryam*] After a year paſſed you may have it diſcontinued, but ſhe ſhall not be Nonſuit. And in the caſe of a common perſon the Plaintif may diſcontinue it within a year, but the Defendant cannot diſcontinue it untill after a year.

Diſcontinuance.

The Queen cannot be Nonſuit.

4.

W *Almiſley* moved for Judgement in the caſe of *Kimpton. Rodes*] We have given Judgement allready. *Walmiſley*] No, Sir, I have not heard of it: *Peryam*] What is the caſe? *Rodes*] The caſe is this; a man was ſeiſed of a 140 acres of land, and had Common appurtenant to them in 46 acres of land, and the 46 acres of land were in the occupation of ſeverall men, *viz.* two in the occupation of *A.* and the reſt in the occupation of *B.* and he which had Common purchaſed the ſayd two acres, now if this entire Common be extinct or no, ſo that they which were Tenants of the reſidue of the 46. acres ſhall take advantage thereby was the queſtion. And all the Juſtices ſayd that they were agreed of this caſe long agoe. For although that the acres be ſeverall, and in ſeverall occupations, yet the Common concerning that is intire, and ſo by purchaſe of parcell it is extinct. *Rodes*] Surely I have noted my book that Judgement is given, and ſo I ſuppoſed that it had been.

Common extinct by purchaſe.

[1964] Cr. 151.

5.

S *Huttelworth* moved that whether a Leaſe is made to a man o his own Land by Deed indented, this is an Eſtopple, whereto the

Eſtoppel.

 Court

Court agreed. But *Windham* and *Peryam* ſayd, if the Leaſe be made for life by Indenture, that yet this ſhall be no Eſtopple, becauſe the Leaſe takes effect by the Livery, and not by the Deed; but *Rodes* did not fully aſſent to that; *Anderſon* was abſent in the Star-chamber.

Livery.

6.

Hill. 19 *Eliz.* *rot.* 1511. *Stat.* 23 *Hen.* 6

DEbt was brought by *Laſſels* upon an Obligation, with condition, that if the Defendant did perſonally appear in the Kings-bench ſuch day, that then *&c.* the Defendant pleaded the Statute of 23 *H.* 6. & ſaid that he was taken by the Plaintif being Sherif then, by force of a *Latitat*, and that the Bond was not made according to the Statute: For being made for his deliverance, this word (*perſonally*) was inſerted in the condition more than is in the Statute. And it ſeemed by three Juſtices (*Anderſon abſente*) that if it were in ſuch an Action where a man may appear by Attourney, that then it ſhall be voyd; but now the queſtion is whether the party ought to appear in proper perſon by force of a *Latitat* or no; And ſome ſaid yea, and ſome ſaid no. And the Plaintif ſhewed a Judgement given in the Kings bench for *Sackford* againſt *Cutt.* where *Cutt.* was taken by a *Latitat*, and made ſuch an Obligation as this is for his deliverance, *Sackford* being *Ballivus ſanct. Etheldredæ in Suff.* and adjudged for the Plaintif that the Obligation was good. And this was in the Kings-bench, *Mic.* 27 & 28 *Eliz. Rot.* 575. but *Peryam* doubted of that judgement; for peradventure he might appear by Attourney; *Ideo quære*; for that was the reaſon of the judgement given in the Kings-bench, as it was ſayd, becauſe he could not appear but in proper perſon.

7.

Jeofayle.

AN Action of Trover was brought for Goods, and the Defendant pleaded a bargain and ſale in open Market, thereupon they were at iſſue, and found for the Plaintif; and now the Defendant ſpake in arreſt of judgement, becauſe the Plaintif had ſhewed no place of converſion; yet notwithſtanding by the opinion of the Court the Plaintif ſhall have his judgement by the Statute. *Peryam*] If in Debt upon an Obligation he doe not ſhew the place, yet if the Defendant plead a collaterall bar, as a releaſe, or ſuch like, judgement ſhall be given for the Plaintif notwithſtanding, by the Statute, if it be found for him by Verdict.

No place of converſion. 36 *El. rot.* 266.

8. The

8.

THe caſe of *Beverley* was moved again at this day, how the Queen had brought a *Scire facias* againſt him, to ſhew wherefore ſhe ſhould not have the Preſentation. *Walmiſley*] It ſeemeth that ſhe ſhall not have the Preſentation; for allthough we have recovered our Preſentation, yet before execution we have but a right. As if a man be diſſeiſed, and after outlawed, he ſhall not forfeit the profits of the land. And allſo ſhe hath brought a *Scire facias*, and this will not lie, except for him which is party, or privy. *Peryam*] After that you have recovered, it is a chattle, and then forfeited by the Utlary. *Anderſon*] The judgment that he ſhall recover, doth not remove the Incumbent, and as long as he remains Incumbent, the Plaintif hath nothing but a right. Then *Peryam* ſayd to *Walmiſley*, argue to that point, whether he hath but a right or no, but for the other point, that ſhe ſhall not have a *Scire facias*, for want of privity, that is no reaſon, for in many caſes, ſhe ſhall have a *Scire facias* upon a Record between ſtrangers. *Anderſon*] If I recover in debt, and after am Outlawed, ſhall the Queen have this debt? *Windham*] If I recover in a *Quare impedit*, and dye, who ſhall have the preſentation, my Executor or my Heir? *Sed nemo reſpondet. Curia*] It is a new, and a rare caſe, and therefore it is good to be adviſed. *Walmiſley*] What ſhall we in the mean time plead in bar to the *Scire facias*? *Curia*] Demur in Law if you hold the matter inſufficient. *Walmiſley*] So we will.

Utlary.

Diſſeiſer outlawed.

Recoverer in debt outlawed.

Recovery in quare impedit.

9.

ONe *Combford* was robbed within the Hundred of *Offlay* in *Staffordſhire*, and he and his ſervant purſued the Felons into another County, and there one of the Felons was taken, and the Hundreds did nothing. And now *Puckering* moved that he might have an Action againſt the Hundred, allthough that he himſelf was reſiant within the ſame Hundred; but the opinion of the Court was againſt him; for they ſayd that if a ſtranger make Hue and Cry, ſo that the Felons be taken, the Hundreds are diſcharged. Another queſtion he moved, becauſe that but one of the Felons was taken. But *quære* what was ſayd to that; for I heard not.

Hue & Cry.

Plaintif a Hundreder.

Hue and Cry by ſtrangers.

Quære.

10.

FRancis *Aſhpool* brought an Action againſt the Hundred of *Evenger* in *Hampſhire*, for that he was robbed there. And the Jury found

Hue & Cry.

found a ſpeciall Verdict, *viz.* that he was robbed after the ſetting of the Sun, *& per diurnam lucem*, and that afterwards the ſame night he came to *Andever*, which is in another Hundred, and there gave notice of the robbery, and the morning following, the men of *Andever* came into the Hundred of *Evenger*, and there made Hue and cry about ten a clock in the morning, and that there were many Towns nearer to the place where he was robbed than *Andever* was, and allſo within the ſame Hundred of *Evenger*, and that the Melafacters eſcaped, and they prayed the adviſe of the Court. Now this matter reſted on two points, the firſt was, if he which is robbed after the Sun-ſet, ſhall have the benefit of the Statute, and the other was, if he had made Hue and cry accordingly, or whether any Hue and cry be needfull. And *Walmiſley* argued that he which is robbed after the Sun-ſet, ſhall be helped by the Statute, for they are bound to keep watches in their Towns to take night-walkers. And to the ſecond he ſaid, that the Statute doth not ſpeak of any Hue and cry, but only *recens inſecutio*, and that ought to be done by the Hundreders. *Shuttleworth* to the contrary; and that it ought to be in the day, and cited *Stanſ.* fol. 35. and after the Sun-ſet it cannot be ſaid to be day. For the Lord cannot then diſtreyn for his Rent *per* 11 *Hen.* 7. 4. nor demand Rent, for he is not bound to be there after the Sun-ſet, and he vouched *Fitz. titulo coro.* 302. but at this time the Judges ſeemed to hold for the Plaintif. *Anderſon*] The Countries are bound by the Statute to keep their Country in ſuch ſort, ſo that men may ſafely travell upon their way. So that at this time the Court held that he ſhould be aided by the Statute, and alſo that no Hue and cry was neceſſary or convenient to be made by the party, but they were not reſolved, and therefore they gave a day to have it argued again.

1. *Robbery after Sunſet.*

2. *Hue and cry*

No diſtreſs.

II.

Normans caſe.

AN Action upon the caſe was brought for theſe words, *thou wouldeſt have ſtoln a piece of cloth, or elſe thou wouldeſt have delivered it to my Wifes Daughter, and thou art a thief and an arrant thief, and I will prove it*, and upon not guilty pleaded, it was found for the Plaintif. And the Defendant ſpoke in arreſt of Judgement, becauſe the former words proved but onely an Intent, which was no Flony, and the laſt words ſhall be referred thereunto, and therefore the Action not maintenable. But now *Shuttleworth* moved for Judgement for the Plaintif, becauſe the laſt words are ſufficient by themſelves, and ſhall not be referred to the former, becauſe they were ſpoken abſolutely by themſelves, and ſo was the opinion of three Juſtices (*Anderſon abſente*) *Rodes*] Otherwiſe it is if the words had been, and therefore thou art a thief.

Words.

Therefore.

12. *Samuell*

12.

Samuell Hayles brought an Action of debt upon an Obligation, the Condition was, that if the Defendant did pay to the Plaintif 40. l. within twenty dayes after the retourn of one *Ruſſell* into *England* from the City of *Venice* in the parts beyond the Seas, that then, *&c.* and the Defendant pleaded in Bar, that *Ruſſell* was not at the City of *Venice*, whereupon the Plaintif demurred in Law, and at this day the Record was read and clearly *per* 3. *Juſtices* (*Anderſon abſente*) it is no good Plea. For in ſuch caſes, where parcell is to be done within the Realm, and parcell without the Realm, they ought to plead ſuch a Plea as is triable in this Realm, and therefore they commanded the Serjeant to move for Judgement when *Anderſon* was preſent, and ſo he did the laſt day of the Term, and Judgement was given for the Plaintif by all the Court.

13.

IN Treſpas by *Moor* againſt *Hills*, the Defendant pleaded that the Dean and Chapter of *Weſtminſter*, made a Leaſe to one *Payn*, who, made Leaſes out of it, firſt to *A.* for certain years rendring Rent, and after the end of that Leaſe, then to *B.* rendring Rent; and afterwards ſold all the entire intereſt to the Defendant, to whom the ſecond Leſſee (which had no poſſeſſion) Attorned; And the Plaintif moved that he might plead a better Attornment, for this is not good, becauſe it is no Attornment. And ſo was the opinion of the Court, and therefore they gave him day to amend his Plea, or elſe let a Demurrer be entred. *Attornment* *Poſſeſſion.*

14.

VPon a wager of Law, it was ſaid by *Anderſon*, that if I am bound to you to pay you a certain ſum of money, and a ſtranger deliver you a Horſe by my aſſent, for the ſame debt, this is no ſatisfaction. So if I be indebted upon a ſimple contract, and a ſtranger make an Obligation for this debt, the Debtor cannot wage his Law, for this doth not determine the Contract. *Et nullus dedixit.* *Payment by a ſtranger.*

15.

Legacie.
2 Lown 119
Mo: 246

BEtween *Peirce* and *Davy* this was the case. A man covenants with *I. S.* to pay to *A.B.* and *C.* every of them x. l. at the age of twenty four years, and makes an Obligation to perform the Covenant; And afterwards makes his Will in this sort. *Item*, I will that every one of my Wifes Children, *viz.* *A. B.* and *C.* shall have every of them x. l. at their severall ages of 21 years, in performance of my Bond and Covenant, in that behalf made at the time of my Mariage, and not otherwise, and dyeth. Then *A. B.* and *C.* sued in the spirituall Court, for these Legacies, and *Peirce* brought a Prohibition, and they prayed a consultation, and the Court seemed to encline to their demand, because they were all strangers to the Covenant, but yet they would not absolutely grant it; And afterwards in *Termino Pasch.* 30. it was moved again, and then the Court doubted, because it was not given as a Legacy, allthough that it was payable before, for that it was given in performance of the Covenant, and not otherwise, and *Anderson* and *Rodes* said precisely that a consultation should not be granted, *sed alii hæsitabant*. But yet they all thought it good reason and conscience that it should be payd, wherefore they compounded the matter, and gave day to *Peirce* to pay the money, and 2 pound 8 pence, to them which had sued in the Spiritnall Court for their costs. The same Testator allso devised diverse summs of money to his Wife, to pay to the said *A. B.* and *C.* in peformance of his Covenant, who had the money accordingly. And in debt brought upon the Obligation for the same Covenant the Executor pleaded *plene administr.* and upon the Evidence all this matter appeared, and the opinion of the Court in the Exchequor was, that it shall be *assetz*, and so adjudged there.

Prohibition.

Assets.

16.

Hue and cry.

BUrnell of *Shrewsbery* was robbed in *Buckinghamshire*, and thereupon he brought his Action against the Hundred, who pleaded not guilty, and the Jury found a speciall Verdict, *viz.* that he was robed the day and year specified in the Declaration, but in another place within an other Parish than he had alleged, but they found allso that both the Parishes were within the same Hundred, and thereupon they prayed the advise of the Court. And three Justices (*Anderson* being in the Starchamber) held clearly that the Plaintif shall have Judgement, and they said, that so was the opinion of my Lord *Anderson* allso, for it is not materiall within what Parish he is robbed, so that it be within the same Hundred.

17. *Richard*

17.

Future charge by possibility.

Richard Hannington Adminiſtr. of the goods and Chattels of *Iſabell Oram* brought an Action of debt againſt *James Richards* and *Mary* his Wife, Adminiſtraterix of the goods and Chattells of *Laurence Kydwelly*, upon a bond for performance of covenants, and the caſe was ſuch. Tenant for 31 one years deviſeth to his Wife as long as ſhe ſhall be ſole and Widow, the occupation and Profits of his Term, and after her Widowhood expired all the Leaſe and intereſt to *Reignold* his Son, and dieth, and the Wife hath the Term by force of the Deviſe, and he in the Reverſion by Indenture bearing date. *quinto Decemb. An. Mariæ primo*, did give and grant, bargain, and ſell, all that his Tenement to the Wife and to her Heirs for ever. And alſo did covenant to make further aſſurance, and that at the making thereof, it ſhould be diſcharged of all former Bargains, Sales, Titles, Rights, Joyntures, Dowers, Morgages, Statutes Merch. Statutes Staple, intruſions, Forfeitures, Condemnations, Executions, Arrerages of Rents, and all other charges, (except Rents and Services which ſhall be due after, *&c.* to the chief Lord) And afterward he made and levyed a fine; And after the Wife maried, and then the Son entred, and the Adminiſtrator of the Wife brought debt upon the Obligation againſt the Adminiſtrators of him in Reverſion, and averred that the Land at the time of the Feoffment was charged with the ſaid Leaſe of 31 yeares. *Walmiſley*] It ſeemeth that Judgement ſhall be given for the Plaintif, becauſe it was not diſcharged at the time of the Feoffment. For in the Commentaries a man Deviſeth his Term to his Wife until his Son come to full age, after at his full age the Son ſhall have it, ſo that there it was chargable to the Entry of the Son hereafter. And here allthough that it be not preſently charged, yet when there is a charge ariſe, the Covenant is broken. And for that in 8 *Eliz.* a man bargains and ſells Land, and Covenants that it ſhall be diſcharged of all charges, and he had granted a Rent before to begin twenty years after, when the Rent begins it ſhall be ſaid a breach. And this is not like the caſe in 3 *Hen.* 7. 12. *b.* Where Tenant in Tayl diſſeiſeth the Tenant of the Land, *&c.* And ſo I think Judgement ſhall be given for the Plaintif. *Fenner* to the contrary, and here the Term was extinct by the grant and ſale, and then the Feoffment void, and therefore no charge, and thereupon no charge at the time of the Feoffment, and for that he cited 42 *Ed.* 3. *&* 11 *Hen.* 7. 20. where Tenant in Dower infeoffs the Heir without deed, *&c.* ſo here, in that ſhe took nothing by the Feoffment, there was no charge at the time of the Feoffment. And this poſſibility of a remainder doth not make an intereſt, and thereupon he cited 8 *Ed.* 3. 3. *Fitz. reſceipt* 35, where Tenant for life lets the Land to one upon condition, that if he dye in

A Feoffment. to her and after alſo.

Com. fo. 539.

Rent charge future.

life of the Leſſor, that it ſhall retourn to the Leſſor, *&c.* upon ſuch a matter he may be received, and he cited for that the caſe of *Wheler*, 14 *Hen.* 8. fol. 17. and a title ſuſpended is no title, 3 *Hen.* 7. 12. & 30 *Ed.* 3. Leaſe for life upon condition, that if the Rent be behind, then he ſhall retain the Land, *&c.* and he ſaid that the opinion of *Bromley* in *Fulmerſtons* caſe was contrary thereunto; but yet he ſaid in 3 *Eliz.* he hath a report which was adjudged contrary to the opinion of *Bromley*. And allſo he cited 50 *Ed.* 3, that a man ſhall not have the Rent and the Tenancy of the Land allſo. And ſo it ſeemed to him that the Plaintif ſhall be barred.

18.

Hue and cry.

THE caſe of *Fr. Aſhpool* was moved again by *Fenner*, and it ſeemed to him that the Plaintif ought to make Hue and cry, for as he ſaid it hath allwaies been the manner of pleading, and allſo it hath been allwaies parcell of his iſſue to prove. Allſo he argued that he ſhould not have remedy by the Statute, *poſt occaſum ſolis*; For *Stamford* ſaith expreſly, that if a man be robbed in the day, that he ſhall have remedy, and the day ſhall be ſaid but from the riſing of the Sun to the fall thereof, for the words of the Statute are, that the Gates of the walled Towns ſhall be ſhut, *ab occaſu uſq; ad ortum ſolis*, and then if the Gates be ſhut, and that walled Town be within a Hundred, how can they make Hue and cry? And the caſe in 3 *Ed.* 3. is not like to this caſe, for there it was enquired and found of the Dozen. *Anderſon*] The freſh ſuit mentioned in the Statute, ought to be made by the Inhabitants, and not by the parties, and I am of your opinion, that Hue and cry was at the Common Law, but what of that? But look the Statute, and there is no word of Hue and cry. And the Statute of 28 *Ed.* 3. is an expoſition of that Statute, and there is no mention thereof, but Freſh ſuit is there mentioned, which ought to be made by the Inhabitants. And by thoſe Statutes it ſeemeth clearly that the Inhabitants ought to guard the Country in ſuch ſort, as men may ſafely travell without robbing. And for the night, Sir, wee ought to conſtrue it, as it is moſt reaſonable, and about the ſetting of the Sun is the common time of robbing, and therefore if this ſhall not be intended by the Statute, nothing ſhall be intended; and allthough the walled Towns cannot perſue, yet they may keep the waies ſo, that no robberies ſhall be committed, and this is both day and night as I think. And if a man be ſlain in the robbery ſo that no Hue and cry can be made, I doubt not but the Country ſhall anſwer for the robbery, and ſo if he be bound: And if Hue and Cry ought to be, when ought it to be? For if a man be bound two dayes together, he had as good make no Hue and cry, as make Hue and cry afterwards,

Freſh ſuit by the Hundreders.

Walled Towns may keep the waies.

A man is robbed ſlain and bound.

wards, and yet I hope you will agree that this man ſhall be relieved by the Statute; which caſe was agreed by all the Court. *Peryam*] The day without doubt is after the Sun-ſet. *Rodes* cited the caſe of waging Battail in an Appeal in *Stamford*. And ſo by agreement of all the Juſtices, Judgement was entred for the Plaintif; but *Fenner* ſayd privately, that in his conſcience it was againſt the Law; yet notwithſtanding all the Judges were clear in opinion, and the Serjeants of the other part allſo. *Day after Sun-ſet.*

So that it ſeemed to the Judges, that no Hue and Gry is neceſſary by the party; for they all agreed that the Country ought to be kept ſo that no Robberies be committed. And *Anderſon* and *Rodes* affirmed preciſely, that it is not neceſſary, and the other agreed in the reaſon thereof, and ſayd that it is not mentioned in the Statute, but ſayd that the waies ought to be kept ſo that men may travell ſafely, or otherwiſe it is againſt the Statute.

19.

IN a Writ of Falſe Judgement brought againſt the Mayor, Sherifs, Citizens, and Commonalty of *Norwich*, it was moved where the Iſſue ſhall be tryed, and *per Curiam* it ſhall not be tryed there, but yet the Action may be uſed there. And in the ſame caſe it was demanded, if the Sherif may ſummon himſelf, and the Court anſwered that he could not, and *Peryam* ſayd that ſo it hath been adjudged here many times. *Tryall.* *Summons.*

20.

THe laſt day of the Term the matter of *Laſſels* was moved again, and it ſeemed to *Anderſon* that the Obligation is voyd, in that there is an expreſs form limited by the Statute, and this varying from the form in ſubſtance, is voyd; for in his opinion he excludes the party from his advantage given him by the Statute. But all the other Juſtices held opinion againſt him; for they ſayd, that a man ought to appear in proper perſon upon a *Latitat*, which *Anderſon* denyed, and ſayd that the *Latitats* are not but of threeſcore yeares continuance, which the other day *Peryam* had affirmed, and he ſeemed to miſlike with the *Latitats*. And the Serjeant moved for their reſolution in the caſe. *Anderſon*] All my Brethren are of opinion againſt me, wherefore take your judgement accordingly. And ſo judgement was entred for the Plaintif.

21.

Traverſe. *Awen* brought Debt upon an Obligation againſt *White*, with condition that if the Defendant ſuffer the Plaintif his Tenants and Farmers to enjoy ſuch a Common, that then, *&c.* And the Defendant pleaded conditions performed, and the Plaintif aſſigned for breach, that he did not ſuffer *A. B.* his Tenant to enjoy, *&c.* *Abſq; hoc*, that he performed the condition. And it was ſayd by the Court, that this Traverſe was not good, no more than if one be bound to perform the covenants in an Indenture, and the Defendant pleads that he hath performed all, generally, if the Plaintif aſſign his breach, he ſhall not ſay further, *Abſq;* that the Defendant hath performed the covenants; for ſo much he had ſayd before. But *Walmiſley* would have put a difference between the caſes, becauſe in the one there were divers covenants to be performed, but not ſo here. *Anderſon*] If a man plead a Plea which is ſufficient of it ſelf, and take a traverſe alſo, you will grant that this Plea is not good, *quod fuit conceſſum*, and this Plea had been ſufficient of it ſelf onely, *quod fuit conceſſum, ergo* the traverſe was not good without queſtion. *Et ſic opinio totius Curiæ.*

22.

Rent charge *Overſtone* brought a Replevin againſt *B.* who avowed the taking for a Rent charge granted to him by the Duke of *Suffolk*. And this was the caſe, The Duke was ſeiſed of three parts of a Mannor, and granted a Rent charge to the Avowant; And one *Pole* was ſeiſed of the fourth part; and *Hatcher* purchaſed the Dukes three parts, and the part of *Pole* alſo, and demiſed a fourth part to the Plaintif; but the Serjeants could not agree whether it was *Poles* fourth part, or otherwiſe the fourth part generally; and as it ſeemed to the Court, if it were the fourth part of *Pole*, then the Avowry is not maintainable; but otherwiſe if it were the fourth part generally. And after in *Michaelmas* Term the caſe was rehearſed again, and it was that he demiſed *eandem quartam partem* to hold at will. And all the Juſtices agreed that it ſhall be diſcharged, becauſe it was never charged, allthough once he might have diſtreined in all the Mannor; for that then there was no fourth part, for all was alike in the hands of the purchaſer, but now when the fourth part is in the hands of a ſtranger, it is no reaſon that it ſhall be charged. *Walmiſley*] But the Tenant at will hath nothing but the profits by the way of taking, and not any land; but if *Hatcher* had made a Feoffment, then I agree that it ſhall be diſcharged. *Feryam*] And as well ſhall Tenant at will take the profits in his own right, as long as the will doth continue, wherefore judgement was given for the Plaintif.

Union of poſſeſſion.

Tenant at wil.

23.

LEſſee for years, the reverſion in fee to *Conſtance Foſter*, and the Leſſee granted over all his term and intereſt to *A. B.* reſerving and excepting all trees growing in and upon the premiſſes, the Leſſee makes waſt and deſtruction in the trees, and *C. F.* brought Waſt againſt the aſſignee, and if this action will lye or no, was the queſtion, wherein it was diſputed, whether this exception and reſervation made by the Leſſee be good or no; for if the reſervation be voyd, then the action will lye well againſt the Aſſignee, and thereupon theſe caſes were put, to ſhew both what intereſt the Leſſor and Leſſee have in the Trees, *viz.* 33 *Hen.* 8. 2 *Hen.* 7. 10 *Hen.* 7. 42 *Ed.* 3. 21 *Hen.* 6. 46. 27 *Hen.* 6. *Waſt in Slatham*, & 2 *Eliz.* fol. *Danſeyes* caſe, & 7 *Hen.* 6. & 12 *Ed.* 4. but to prove the reſervation voyd *Fenner* took this ground, That thing which a man cannot grant, he cannot reſerve; and the Leſſee cannot grant the Trees, *ergo*, he cannot reſerve them. And afterwards judgment was given for the Plaintif, for default of pleading on the part of the Defendant; but for the matter in Law two Judges were againſt the other two, ſo that they could not agree. *Waſt. Paſch.* 18 *El. Rot.* 420.

De Term. Mic. An. Reg. Eliz. *xxix.* & *xxx.*

1.

AN action of Debt was brought by *Bret* againſt *Andrews* upon an Obligation indorced with condition to ſtand to the arbitrement of *A. B.* who did arbitrate that the Defendant ſhould pay to the Plaintif xx l. and appointed no certain day of payment; and the Defendant in pleading confeſſed the arbitrement; but he ſayd further, that the Plaintif did never require him to pay it, and thereupon the Plaintif demurred in Law, and upon readiug of the Record, the Court held clearly, that it was no plea, becauſe the Defendant at his peril ought to make payment within convenient time, and the Plaintif needeth not to make any requeſt. And *Anderſon* commanded to enter judgment accordingly. *Requeſt.*

2. *Fenner*

2.

Possibility of Interest. FEnner moved this case, a man deviseth lands to his Wife for term of her life, and if she live untill his sonne come to the age of 24 yeares, that then he shall have the lands; and if she dye before he come to that age, that then *I. S.* shall have it, untill his sonne come to that age, and dyed; then *I. S.* dyed before the wife, and after she dyed before the sonne came to 24 years, if the Executors of *I. S.* shall have the land untill the sonne come to that age or no, was the question. And the opinion of all the Court was, that they shall not have it, because their Testator had never any interest vested in him. *Fenner*] But here was a posiblity of an interest. *Curia*] But that is not sufficient. *Rodes* cited the case of *Bret* and *Rigden* in the Commentaries. *Anderson*] If I grant you, that if you pay me xx l. at *Easter*, then you shall have an Annuity of xl s. to you and your heirs, if you dye before *Easter*, now your Heir shall never have it, and so in this case.

Grant.

3.

Redisseisin. THatcher recovered in an Assise of *Novel disseisin* against *Elmer* for Lands in *Hackney* in *Middlesex*, and after *Elmer* re-disseised him, and *Thatcher* re-entred, and *Elmer* disseised him again. And *Fleetwood* moved the Court if *Thatcher* may have re-disseisin, because that after action accrued to him he had re-entred. *Anderson*] What is the Judgement in this Action? Surely it is not that he shall recover any land, but double damages, and that the Defendant shall be taken, and shall make a Fine; wherefore forasmuch as he shall recover no land, the entry into the land cannot purge the offence and wrong, which is made punishable by the Statute; and so was the opinion of the whole Court. And the Court then held opinion likewise, that if a man be disseised, and after re-enters, and is disseised again, that he ought to have an Assise of the last entry, and not of the first, 27 *Ass. pl.* 42.

Judgement.

Assise.

4.

Privilege. ONe *Powell* was sued in the Common-Pleas, and as he was coming to *Westminster*, he was arrested in *London*, and thereupon had a common Writ of Privilege surmising that he was coming to retain Counsell; and *Walmisley* prayed that he might be examined whether he did so or no, but the Court would not. *Walmisley*] It is no reason that if he be going about other matters he should have the privilege of this place. *Curia*] A hundred Writs have been allowed

lowed without any examination. *Walmisley*] In 10 *Hen.6.* & 4 *Hen.* 7. such an examination was made. *Anderson*] But that was not *de rigore Juris*, and all the Court refused utterly to examine him. But *Walmisley* sayd privily, that it was against the Law.

5.

Wager of Law.

DOrothy *Millington* brought Debt against *J. Burges* for 9 l. and declared that he bought certain Oad; and the truth of the case was, this Oad was sold to him upon condition, that if she did not prove it to be good and sufficient, then he should pay nothing for it, and all this was disclosed by the Defendant upon his Wager of Law. *Windham*] If the case be so, then you may wage your Law, and it was sayd, that she must have detinue for the Oad.

Detinue.

6.

Title in avowry.

IN an Avowry made by the Lady *Rogers*, it was sayd by the Court (*Anderson absente*) that it is sufficient for the Avowant to plead his Freehold, but if the Plaintif will traverse the same, he ought to make himself a title. *Nelson* Pronotary, so are all our Presidents. *Peryam*] It is not sufficient to make it of his own seisin, but he must make it Paramount his own seisin.

7.

WAlmisley moved for Judgement in the case of *Richard Hanington* for the Plaintif. For he sayd that it was not clearly discharged, because of the possibility of the charge ensuing, allthough the charge were not then presently executed; in proof whereof, he sayd that it is not all gone by the acceptance of the Feoffment, and then it is a bargain, for a Lease for years is a bargain; for there he hath *quid pro quo.* Allso it is a Title, as in *Nichols* case in the Commentaries: And then allthough he had nothing which he could release, because it was casuall whether it shall happen or no, yet now when it happens it is a charge *ab initio*, and thereupon he cited 9 *H.* 6. where one which had nothing but a possibility may maintain. And so where a man makes a Feoffment, and covenants that it shall be discharged, as here; and afterwards his Wife recovers her Dower, the Covenant is broken, and yet it was but a possibility. And 8 *Eliz.* where a man covenants that it shall be discharged, and he had granted a Rent charge to begin twenty years after, this was not discharged. *Fenner* argued to the contrary for the reasons moved by him

him before. *Peryam*] Here allthough it be no charge at the time of the Feoffment, yet it is not diſcharged ; for if it were diſcharged, then it ſhall never be charged afterwards. And ſo was the opinion of all the Court (*Anderſon abſente*) and after at the end of the Term when *Anderſon* was preſent they were all agreed that it was an incumbrance, and not diſcharged of the incumbrance, and therefore they gave Judgement for the Plaintif.

8.

Tennre. IN Avowry by *Johns* of *Surrey* Eſquire, it was ſayd by *Anderſon* for Law, that if a man before the Statute of *quia emptores terrarum*, makes a gift, and reſerveth to himſelf upon every alienation the value of the Land by a year, this ſhall be adjudged according to the value of the Land at the time of the tenure, and not that whereunto it is enhauuced at this day, for a tenure ought to be certain when it is made.

9.

Statute 23 H. 6 RAven brought Debt upon an Obligation againſt *Stockdale* who pleaded *non eſt factum*, and the Jury in *Norfolk* found this ſpecially Verdict, that the Defendant was ſued by the Plaintif, and made a Bond to the Plaintif endorced with Condition, that if the ſayd *S.* did perſonally appear in the Queens Majeſties Court called the Kings bench, and then and there make anſwer to ſuch matter as the Plaintif ſhould object againſt him, the ſayd Plaintif giving him warning, that then, *&c.* And the Plaintif was neither Sherif nor Sherifs Officer, for the pretence of the Defendant was to avoyd it by the Statute of 23 *Hen.* 6. And now the Plaintif prayed Judgement. *Anderſon*] The caſe is no more than this ; A man is bound to another to appear at his ſuit in the Kings-bench, and doth not ſo, if this Obligation ſhall be avoyded, and I ſee no colour to avoyd it ; for it is not within the Statute, and all the Judges agreed clearly, that it is not within the Statute, and therefore they gave Judgement for the Plaintif.

10.

Poſſeſſion. BLoſſe brought Treſpaſs *vi & armis* againſt *Halmen* for taking of his Goods, the Defendant pleaded not guilty, and the Jury found a ſpeciall Verdict, that the Plaintif at the time of the Treſpaſs ſuppoſed was of the Myſtery of the Grocers, and that the Defendant was his ſervant, and put in truſt to ſell *res & mercandiſas de tempore*

tempore in tempus in ſhopa ſua exiſten. and he took thoſe goods and carried them away, *&c.* and they prayed the adviſe of the Court. The doubt was becauſe the action was *vi & armis*, whereas the Defendant had the cuſtody, or if this ſhallbe called a cuſtody. *Shuttleworth* for the Plaintif, and he cited the caſe in *Littleton* fol. 15. if I deliver my ſheep to compoſt your land, and you kill them, I ſhall have treſpaſs, whereto the Juſtices agreed, and held clearly that he ſhall have this action well enough. *Peryam*] he hath but an auctority only, and not any cuſtody or poſſeſſion. *v.* 2 *E.* 4. 22. 2 *E* 4. 8. 22 *E.* 4. 5. 13 *E.* 4. 9. Tenant at will ought not to cut down trees nor abate. 3 *H.* 7. 12. 21 *H.* 7. 14. the caſe of *Butler*.

Sheep.

Auctority.

II.

TReſpaſs by *Foſter* againſt *Pretty* and his wife, who juſtified that I was ſeiſed and made a leaſe to them for yeares, *&c.* the Plaintif replied *de ſon tort demeaſne, Abſq; hoc* that he leaſed, *&c. Peryam*] Will you take a Traverſe and not make your ſelf a title? *Cur. a*] without queſtion you ought to make your ſelf a title, otherwiſe it is if the Defendant claym a Common, or ſuch like, and no poſſeſſion of the land.

Title.

II.

BRet Plaintif againſt *Shepheard*, the Condition of the Obligation was to appear at his Suit in the Kings-bench, and upon Condition performed pleaded, the iſſue was found for the Plaintif. And now he ſpake in arreſt of judgement, for that the triall ought to have been by the Record, and not by the Country. And ſo was the opinion of the Court. But *Radford* Pregnotary ſaid that the triall was good enough, for it may be that he appeared there, and yet there is no Record made thereof; to whom it was anſwered, that then it is no appearance if it be not recorded; and *Radford* replied, ſuppoſe that there is not any ſuch ſuit there? how then can it be recorded? but the rule of the Court was *ut ſupra*, for then the Obligation ſeemeth to be ſingle.

Apparance.

Triall by the Record.

13.

THe caſe of *Calgate* againſt *Blyth* was now again argued by *Fletewood* for the Plaintif. And firſt he ſaid that the limitation by the Wife is not good, for which he took this ground, that alwaies when a man ſhall gain a fee ſimple by matter of concluſion of Record, that he ſhallbe ſeiſed to his own uſe, And here the Husband had a fee

ante 12
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Owen 6.

fee by concluſion by the fine, and therefore his limitation good only. And there upon he put a caſe reported by *Carill*, who was a grave man, and very learned in the law. That if Husband and Wife levy a fine to *B.* who rendereth to them again for life, the reverſion ſhall remain in the Coniſor to his own uſe, Alſo he put another caſe put by *Baldwin* in the time of *H.* 8. that a man ſeiſed in right of his Wife grants *totum ſtatum ſuum* to another, the grantee ſhall have it no longer than during the life of the Husband if his Wife overlive him, but if ſhe have iſſue by him, then he ſhall have it during the life of the Husband abſolutely. And if two tenants in common infeoff *B.* in fee to their uſe, they are then tenants in common of this uſe, but if they levy a fine to *B.* to their uſe, then they are Joyntenants. And in Queen *Maries* time a parſon of a Church, by licence of his patron and ordinary levied, a fine of a portion of his Rectory, and it was adjudged that it ſhall be to his own uſe in his naturall capacity; the ſame law is if a Biſhop levy a fine, and he cited 11. *H.* 4. 1. the firſt caſe, and ſo he prayed judgment for the plaintif. *Anderſon* chief juſtice rehearſed the caſe, and firſt he ſaid that the Wife without her Husband cannot limit the uſe without doubt, And here the caſe is no more, but whether the husband may limit the uſe without the privity of his Wife, and I think it a ſtrong caſe that he cannot. If Husband and Wife have an uſe, and they grant it over to one who hath notice of the Uſe, this ſhall be to the uſe of the Wife again; and he defined an Uſe to be an intent and truſt to convey lands, and cited 6. *H.* 7. and that when the intereſt of the inheritance is in the Wife, if Husband and Wife levy a fine, this ſhall be to the uſe of the Wife, for the uſe ariſeth out of them which give the land, and not by the Coniſes or Feoffees, for they neither grant nor give the uſe, and then it ſhalbe to the uſe of the Wife again. But if the Husband alone make a Feoffment, this ſhall be to his own uſe, and the Wife after his death ſhall be driven to her action. And if the wife had been privy or aſſenting to the limitation, although ſhe had not been named, yet it ſhould be a good limitation, but the Jury have found that ſhe was not privy; And a caſe was here adjudged, that where a fine was levied, and the limitation made after by Indenture, that this ſhall be to the uſe of the Indenture, if there be no other againſt it; but in this caſe it is found expreſly by the Jury, that ſhee never agreed, which doth impugn that which otherwiſe ſhould be intended; then now the caſe is no otherwiſe but that a fine is levyed, and no uſe is limited, but if the fine had been levied, & the Husband only limited the uſe, and nothing els had been done againſt it, then it ſhould have been to the uſe limited by the Husband, becauſe it ſhould have been intended that the Wife had conſented thereunto, and ſo I think judgment ſhalbe gi-

Carill.
Fine levied
Grant of all Eſtate.
Fine.
Feoffment.
Difference per Tenants in common.
Parſon levies a fine.
Biſhops.
Notice of a uſe.
What a uſe is.
Fine.
Feoffment by the Husband alone.
Aſſent without naming.
Indenture after a fine levied.
Silence is an agreemeni.

ven

ven againſt the Plaintif. *Windham*] I am of the ſame opinion, and it ſeemeth that their difference and diſagreement in the limitation is the cauſe that both the limitations are void. Firſt let us ſee who hath auctority to limit the uſe? ſurely the principall owner of the land hath the principall auctority to limit the uſe, and here the Wife is the principall owner, and therefore hath chief power to diſpoſe of the uſe; And, Sr. the uſe is the chief profit and commodity of the land, and cannot be ſevered from the land, no more than the ſhadow from the body, and this was the reaſon of the Statute of 27. *H.* 8. which draweth the poſſeſſion to the uſe, and not the uſe to the poſſeſſion, for the uſe is the principall, for by the common law by bargain & ſale enrolled the land ſhall paſs without livery, for this was a contract for the uſe, and then the law ſhall make the land to paſs, and whitherſoever the uſe is now carried, the land and poſſeſſion ſhall follow, but when the Law carrieth the uſe, it is to the owner and proprietary of the Land. For if a man ſeiſed of Lands on the part of his Mother, levy a fine thereof, the uſe ſhall paſs according as the land ſhall, becauſe the law carrieth the uſe. And here the Wife cannot limit the uſe without her Husband, and therefore that is void, but yet it is good to this intent, to ſhew her diſagreement. And if the Husband limit the uſe, and ſhe doth not diſagree, the law intendeth that ſhe conſenteth thereunto, becauſe ſhe hath joined in the fine. And therefore in London, ſale of the lands of the Wife by deed enrolled by the Husband only is good if ſhe aſſent, or if ſhe do not diſagree. And although that ſhe ſhall not be examined concerning the uſe, yet the Law will not have her defrauded of her land by joyning in the fine, without her conſent to the uſe; for by that meanes every Wife may be defrauded of her land by joyning in a fine, which were a great inconvenience, and contrary to this ground in Law, that the Husband cannot diſpoſe of the Wifes lands without her conſent. And although that if the Wife had not ſhewed her agreement or diſagreement, then it ſhould have been to the uſe limitted by the Husband, yet here ſhe hath ſhewed an expreſs diſaſſent, and ſo by their variance, both their declarations are void, as in a *Quare impedit* by two, if both make ſeverall titles, both ſhallbe barred, and ſo judgment ſhallbe given againſt the Plaintif. *Peryam* to the ſame intent. Firſt it is a plain caſe that if a Husband and Wife levie a fine and limit no uſe, then the uſe is to them as the land was before, for the uſe is the profit of the land, and the Wife alone cannot limit the uſe, for during the coverture ſhe hath ſubmitted her will to the will of her Husband. And if they both levie a fine, and he onely by Indenture limits uſes, if ſhe do nothing, then his limitation is good, and the caſe of *Vaviſour* adjudged here that a limitation after the fine is

What a uſe is.

Bargain and ſale.

The Law erects the uſe.

The mothers heir.

Silence Conſent

Sale in London by Husband and Wife.

Quare impedit.

No Uſe limited.

Uſe what it is.

Silence.

Limitation after fine.

good. And here the Husband hath limited the uſe to himſelf for life; and afterwards they both agree in the limitation, now if the reſidue in which they agree ſhallbe good? I will ſhew my opinion therein likewiſe, becauſe that alſo may come in queſtion hereafter. And I think that this ſhall not bind the inheritance, for it is a ground in Law, that limiters of uſes ſhallbe ſuch as have power intereſt and auctority of the land, and no further; As if Tenant for life and he in reverſion joyn in a fine, Tenant for life ſhall limit but for his life, but here by the death of the Wife the ability of the Husband is gone, for he had no iſſue by her, and therefore his uſe ſhall bee gone allſo, for otherwiſe it ſhould be a great inconvenience; but if they had joyned in the limiation, then the inheritance of the Wife had been bound, and ſo it is if the Law can intend that ſhe had agreed; And to ſay that the Coniſees ſhall take it from the Husband and Wife, and therefore the Wife to be concluded, is but ſmall reaſon, for ſhe may confeſſe the Record well enough, as appeareth by the caſe of *Eare* and *Snow* in the Com. and no man can limit uſes further than he hath the land, and here the limitation for the inheritance after the death of the wife cannot be good, and for their variance both are void. And ſo I think judgment ſhallbe given againſt the Plaintif. *Rodes* to the ſame intent, for the Jury hath found that the Wife did not agree, and this ſpeciall finding ſhall avoid all other common intendments. And the intendment of the party ſhall overthrow the intendment of the Law, and he cited *Eare* and *Snowes* caſe, where it was found that the wife had nothing. And he cannot limit uſes further than he hath eſtate in the land, and therefore judgment ſhall be given againſt the Plaintif. *Anderſon*] then enter judgment accordingly.

Who ſhall limit uſes.

Fine.

Inheritance. ſhall be bound by agreement.

Intendment.

14.

AN Action upon the ſtatute of Hue and cry was brought againſt the hundred of *Dunmow* in *Eſſex*, and the Jury found a ſpeciall verdict that the Plaintif was robbed about three a clock in morning before day light, and thereupon prayed the adviſe of the Court, And now all the Judges were agreed, that for becauſe the Robbery was done in the night, and not in the day, therefore the Hundred ſhall not be charged, and they commanded to enter judgment accordingly.

Robbery in the night

15. Between

15

BEtween *Cogan* and *Cogan* the caſe was, that the Defendant had ſold certain land ſowen with oad to the Plaintif, and that if any reſtraint ſhall be by proclamation or otherwiſe, that it ſhould not be lawfull to the Plaintif to ſow and make oad, then he ſhould have certain mony back again, and after proclamation came that no man ſhould ſow oad within four miles of any market Town, or clothing Town, or City, or within eight miles of any Manſion Houſe of the Queen, and the Plaintif ſhewed the Land was within foure miles of a Market Town, and becauſe he did not averr that it was a Cloathing Town alſo, the Defendant demurred in law, And all the Judges held, that he had ſhewed ſufficient cauſe of his Demurrer, for the meaning was to reſtrain by the proclamation aſwell all manner of market Townes, as thoſe market Townes which were clothing Townes. And after *Puckering* ſhewed that the reſtraint was onely from ſowing oad, and not from making, and their Contract was that if any reſtraint ſhould be from ſowing and making, in the copulative, whereby he thought the Plaintif ſhould be barred, *quod Curia conceſſit*. *Copulative.*

16.

BEtween *Cock* and *Baldwin* the caſe was, that a leaſe was made for 21 yeares to one *Trewpenny* and *Elizabeth* his wife, if he and ſhee, or any child or children between them lawfully begotten, ſhould live ſo long; And after they were married the wife died without iſſue; if the leaſe be thereby determined or no was the queſtion? becauſe it is in the conjunctive (he and ſhe) and now one of them is dead without iſſue; and this caſe is not like *Chapmans* caſe in the Commentaries; where one covenants to infeoff *B.* and his heires, for there it is impoſſible to Emfeoff his heires as long as *B.* ſhall live, and therefore there it ſhall bee taken in the disjunctive and the ſame Serjeant ſaid that if *A.* lets land to two for life, if one dye, the other ſhall have all by ſurvivour, becauſe they took it by way of intereſt; but if I let land to two to have and to hold for the lives of two other, if one of them dye, the leaſe is gone, *quod fuit conceſſum*, and here the leaſe ſhall be determined by the death of one, becauſe ſo was the intent. *Rodes*] the meaning ſeemeth to be conrrary, for by the (or) which commeth afterward, it appeareth that they ſhould have their lives in it. *Peryam Anderſon* and *Wyndham* ſaid that it appeareth by the disjunctive ſentence which commeth afterward, that the intent was that the leaſe ſhall not be determined by the death of one of them, and the reaſon which moved the

Paſ. 29. Eliz. Rot. 1410.
Copulative.
Leaſe to 2 for life
Leaſe for life of 2
Difference.

the Lord *Anderſon* to think ſo was, becauſe the ſtate was made before the marriage, and ſo it is as a joynture to the wife, and therefore not determined by the death of the one. And after they all gave judgment accordingly.

17.

Treſpaſs vi & armis againſt Tenant at Will Waſt.

Algrave brought treſpaſs *quare vi & armis* againſt *Somerſet* being Tenant at will, and the Defendant demurrred in law whether ſuch an action will lie againſt him or no, it was for cutting down of trees, And at this day *Anderſon* rehearſed the caſe, and ſaid that they were all agreed, that the action will lye well enough *vi & armis*, for otherwiſe he ſhall have no action, for waſt is not maintainable, and *Littleton* ſaith that Treſpaſs lyeth, & ſo ſeemeth the better opinion, in 2 *E.* 4. 33. for otherwiſe this being a common caſe, it ſhall be a common miſchief; And he commanded the Pregnotary to enter judgement for the Plaintif.

18.

Property.

Snagg moved to ſtay Judgdment in the caſe of *Bloſſe*, and he cited 2 *Ed.* 4. 4. If the ſervant of a Mercer take his goods, Treſpaſs will not lie, (*ſed vide librum*) and he cited 3 *Hen.* 7. 12. that it ſhall not be Felony in a Shepherd or a Butler. *Windam*] If he had imbezeled the goods, it is Felony, and for the caſe of 3 *Hen.* 7. it is Felony without queſtion, *quod fuit conceſſum. Anderſon*] The ſervant hath neither generall nor ſpeciall property in the goods, and he ſhall have no Action of Treſpaſs if they be taken away, and therefore if he take them, Treſpaſs lieth againſt him, and if he imbezell them, it is Felony, wherefore he commanded to enter Judgement for the Plaintif.

Property. Taking Embezeling. Difference.

19.

Paſ. 25. Eliz. Rot. 602. Waſt.

Thomas Taire and *Joane* his Wife brought an Action of Waſt againſt *Pepyat*, and declared how that the Defendant was ſeiſed in Fee, and made a Feoffment to the uſe of himſelf for life, and after to the uſe of the Mother of *Joane* in Fee, who died, and it deſcended to her, and after the Defendant made Waſt, *&c.* The Defendant pleaded that he was, and yet is ſeiſed in Fee, *Abſq; hoc* that he made the Feoffment in manner and form, *prout*, *&c.* And the Jury found a ſpeciall Verdict, that the Defendant made a Feoffment to the uſe of himſelf for life, but that was without impeachment of Waſt, the Remainder in Fee as before. And the Plaintif prayed Judgement, and the doubt was, becauſe they have found their iſſue, and more

more, *viz.* that it was was without impeachment of Waſt. *Anderſon*] Whether it were without impeachment of Waſt or no, was no part of their iſſue, and then the Verdict for that point is void, and the Plaintif ſhall have Judgement. *VVindham*] The doubt is for that they have found that the Defendant is not puniſhable, and where a Verdict diſcloſeth any thing, whereby it appeareth that the Plaintif ought not to Recover, Judgement thereupon ought to be given againſt him; As in *detinue*, the Plaintif counts upon a Bailment by himſelf, and the Jury findeth, that another Bailed to his uſe, the Plaintif ſhall not Recover. And a Serjeant at the Bar ſaid, that the iſſue, is not found. *Anderſon*] That which is found more than their iſſue is void, and therefore in 33 *Hen.* 6. where the Tenant in Aſſiſe pleades *nul Tenant de franktenement noſme en laſiſe & ſi trone ne ſoit.* &c. and the Jury found that he was Tenant, but that he held jointly with another, and there the Plaintif Recovered, and ſo he ſhall here. And at length by the opinion of all the Court, Judgement was entred for the Plaintif; for he might have helped the matter by pleading. *Bailment.* *Aſſiſe.*

16.

IN debt by *May* againſt *Johnſon*, the Condition was to pay a 100 l. to *Cowper* and his Wife, and by all the Court, if he plead payment to *Cowper* alone, it ſufficeth, for payment to him alone ſufficeth without naming the Wife. *Payment.*

15.

IN a *Quare impedit* by Sir *Thomas Gorge*, againſt the *B.* of *Lincoln* and *Dalton* Incumbent, the caſe was that a Mannor with an advowſon appendant was in the hands of the King, then the Church becoms void, and after the King grants the Mannor with the advowſon; now the queſtion was, if the Patentee ſhall have this preſentation, or the King? And all the Judges held clearly that the avoydance doth not paſs, for it was a Chattell veſted in the King, and they cited 9 *Edward* 3. 26. and *Dyer* fol. 300. but *Fitzh. nat. br.* is contrary. fol. 33. 11. *Avoydance.*

22.

DEbt was brough by *Goore* Plaintif for 200. l. upon ſuch a Bill; Be it known unto all men by theſe preſents, that *I*, *Ed. Wingfield*, of *H.* in the County of *Midd.* Eſq; do acknowledge my ſelf to *Bailiwick.*

be indebted to *William Geare*, in 200. l. for the payment whereof I, mine Heirs, and Aſſigns, do licence the ſaid *G.* to have and uſe the Baliwick of *Dale*; to the uſe, *&c.* untill, *&c.* the Defendant pleaded in bar, that the Plaintif had uſed the ſaid Bailiwick, and ſaid no more, nor at what place he had received the money; and *Sugg* moved that the Plea was not good, becauſe he had not ſhewed the value, which he ought to have done: and the Judges were of the ſame opinion, and they ſaid moreover that this Plea is not good in bar of this ſpecialty, for payment is no plea upon a ſingle Bill, and he might have brought his Action upon this Bill, without uſing the Bailiwick; for this Licence is no Condition. *& adiornatur.*

Value.

Licence.

De Term. Hill. Anno Eliz. xxxx.

I.

Covenant. AN *Ejectione Firme* was brought by *Dorothy Michell* againſt *Edmund Dunton*, and the caſe was this. A man maketh a Leaſe for years, rendring Rent upon Condition, with a Covenant that the Leſſee ſhall repair the Houſes, with other Covenants. And after he deviſeth the ſame Lands to the ſame Leſſee for more years, rendring the like Rent, and under the like Covenants, as in the firſt Leaſe; the remainder over to another in Fee, and dyeth. Then the firſt Leaſe expires, and the Leſſee held in, by force of the Deviſe, and did not repair the Houſes, ſo that if the firſt Leaſe had been in *eſſe*, he had broken a Covenant, *Condition.* now if this ſhall be a Condition, ſo that he in Remainder may enter, was the queſtion. *Shuttleworth*] This is a Condition; for he cannot have an Action of Covenant, and then the intent was, that it ſhall be a Condition. But all the Court was againſt him, and that the intent was not ſo, for the words are (under like Covenants) which words do not make a Condition, allthough they be in a Will. *Covenant.* *Anderſon*] The nature of a Covenant is, to have an Action, and not to enter, and ſo all the Court held it no Condition. And *Peryam* ſaid, that (under like Covenants) were void words, and therefore Judgement ſhall be given againſt you.

2.

Fee determinable. *Pllekering* the Queens Serjeant moved, that one *Adams* was indebted to the Queen in a great ſum which was ſtalled to pay yearly

yearly ſo much, untill all werere paid. And for ſecurity he levied a a fine to *William* Lord *Burghley* Lord Treaſurer, and others, that they ſhould ſtand ſeiſed to the uſe of *Adams* untill he made default of paiment of the ſaid ſum, and then they ſhould ſtand ſeiſed to the uſe of the Queen untill ſhe were ſatisfied and payed, and then to the uſe of *Adams* and his Heirs; And after *Adams* by deed enrolled, ſold the Land to a ſtranger in Fee, and after the ſaid ſtranger failed in paiment of the ſaid yearly ſum, whereby the Queen ſeiſed the Land, and ſo continued untill ſhe was ſatisfied, now the queſtion was, who ſhould have the Lands, *Adams*, or the Bargainee? *Anderſon*] If you will take the caſe according to the words, it is ſhort, tell me, what Eſtate had *Adams* by this Limitation? *Puckering*] A Fee determinable. *Anderſon*] How then can the Bargainee have it when the Eſtate is determined? *Puckering*] But the Fee was limited to *Adams* and his Heirs. *Anderſon*] This is but a poſſibility which cannot be granted over. Aad if I were a Chancellor, *Adams* ſhould not have the Land, but upon the words I tell you my mind. *& alii Juſtic. conticuerunt.*

Poſſibility cannot be granted, nor releaſed.

3.

Daniel Bettenham Plaintif againſt *Debora Harlackendon*; the caſe was this, one *Harlack* was ſeiſed, and deviſeth it to the Plaintif for years, the Remainder to the Defendant being his Wife for life, and provided that the Leſſee ſhould pay the Wife xx. l. a year for Rent, at two Feaſts, and after the Plaintif failed of payment, wherby the Wife entred for the Condition broken. *Anderſon*] Wherefore may not a man make Reſervation upon a Deviſe? *Peryam*] A man may reſerve to himſelf or to his Heirs, but this is to a ſtranger. *Anderſon*] Every man which takes by a Deviſe, is in, in the *per* by the Deviſor, *quod fuit conceſſum*, wherefore then ſhall not this be as a Reſervation to the Deviſor, and as a grant of the Reverſion to the Wife. *Gawdy*] If it ſhall be a ſum in groſs, yet I think that ſhe ought to demand it, which ſhe hath not done. *Anderſon* and *Rodes* denyed that caſe clearly, and that the contrary hath been adjudged. *Anderſon*] If I Deviſe Lands to a man for years, rendring Rent to me and mine Heirs, And after I Deviſe the Reverſion, he ſhall have the Rent as incident to the Reverſion. *Peryam*] This may be agreed, but the caſes are not like. *& adjornatur.*

Reverſion upon a deviſe.

Sum in groſs.

Deviſe of a Reverſion after a Term.

4.

IN debt by *Boſtock*, the caſe was, that the Plaintif and another made a Contract with the Defendant, and the Plaintif alone brought

Waging of Law.

 the

the Action, and *Walmisley* moved the Court, if the Defendant may wage his Law, for it is not the same Contract, and he cited 20 *Hen. 6. account before Auditors*, where it was but before one Auditor, he may wage his Law, & 35 *Hen. 6.* is an express case in the point. And so was the opinion of the Court. *Anderson absente.*

Voucher.

5.

A Writ of Entry *sur diss.* was brought by Sir *Thomas Sherly*, against *Grateway*, who vouched one *Brown*, and he entred into the Warranty, saving to himself a Rent issuing out of the same Land, and this was allowed by the Court, and the Voucher was in a Writ of entry for a Common Recovery to be had.

Slander.

6.

Edward Smith brought his Action of the case against *Warner* for words, *viz.* I was robbed of goods to the value of 40.l. & they were stollen by *Smith* and his Houshold (*ipsum Edwardum ac quosdam Eliz. xuorem ac* L.F. *servientem ejus muendo*) and the issue was found for the Plaintif. And the Defendant spake in arrest of Judgement, because *S.* alone brought the Action. But all the Court said, that the Action is well brought, for the slander is severall. And *Peryam* [illegible] a man say that three have robbed him, and name them, *uno flatu*, every of them may have a severall Action.

Vno flatu.

Redisseisin

7.

IN an Assise by *Thatcher* where he was Redisseised, the Redisseisin was found in part, and thereupon the Court was moved, if Redisseisin will lie, in as much as it is not but of part, and the Writ is, if he be *Redisseisitus de eodem tenemento*, then Redisseisin lieth; but the Court held that Redisseisin lieth of part, and that he shall recover damages, as they are assessed by the Jury, and not by the Assise. Then it was moved, if Redisseisin lieth in *Middlesex* or *London*. For *Fleetwood* saith, that the ancient Expositors have taken it, that it doth not lie there, because it is not *coram Justic. itinerant* but all the Court held the contrary. And *Walmisley* said, that there be Writs in the Register accordingly.

8.

Time convenient.

THe Earl of *Kent* brought debt upon an Obligation indorced with Condition, that if the Defendant do permit the Plaintif, his Executors

cutorts and Assignes not onely to thresh the Corn in the Defendants Barn, but allso to cary it away, from time to time, and at all times hereafter convenient, with free Egress and Regress, or elſe to pay 8 l. upon requeſt, that then, *&c.* and in truth the Defendant permitted the Corn to be there two years, in which time, Mice and Rats had devoured much of it, and then the Defendant threshed the Residue, and the Earl brought his Action, and there was a demurrer entred. *Walmisley*] the Bond is not forfeit, for the Earl hath not taken it out in time convenient, for he ought to take it in time convenient, and time convenient is that which is not prejudiciall to any perſon, (which the Juſtices privily denyed,) and here it is a prejudice to the Defendant, if the Plaintif will not carry away his Corn, and thereupon he cited many caſes, that things ſhall be done in time convenient, as in 21 *Ed.* 4. arbitrement ought to be made in time convenient. *Anderſon*] Your caſes are by act in Law, but here you have bound your ſelves, and the Condition is(at time convenient) and if he will come in the night, or on the Sabbath day, this is no convenient time, but allthough that he come in a long time after, yet it may be (at) time convenient, and the words are not (within) time convenient, and ſo was the opinion of the Court. And *Windham* ſaid, that if it had been (within) time convenient, there would have been a difference. *Arbitrement.*

9.

Michael Hare and 3 others brought an Action of Treſpaſs *quare clauſum fregit*, and Aſſigned the place in ſixteen Acres of Land called Churchcloſe, and the Defendant pleaded not guilty, and the Jury found a ſpeciall Verdict, that Churchcloſe conteyneth ſixty Acres, whereof thoſe ſixteen were parcell, and that diverſe men were ſeiſed of divers other parcells of the ſaid cloſe, and that *Hare* only was ſeiſed of the ſaid ſixteen Acres, in which, *&c. & expoſuit eas* to the three other Plaintifs to be ſown, and that he ſhould find half the ſeed, and they three ſhould find the other half, whereby the Land was ſown accordingly, and that the Bore of *Okely* came and deſtroyed the Corn. *Sed utrum, &c.* And the doubt reſted upon two points, 1. becauſe the Verdict ſaith, that it conteineth ſixty Acres, and ſo ſhall be intended not the ſame place, and the Court varied in opinion thereof, inſomuch that the ſixteen Acres are found to be within the cloſe conteining ſixty Acres, but for the 2 which was, that they all four joyned in *quare clauſum fregit*, and it appeareth that three have nothing there, but that *Hare* is ſole ſeiſed, And for that, the Court held opinion that the Verdict ſhall abate the Writ, for the Defendant cannot break their cloſe where three of them have nothing, *Treſpaſs.* *Contents of a new aſſignment.* *Verdict ſhall abate the Writ.*

nothing, but *Hare* onely. *Rodes*] A Case hath been adjudged, where *Cheney* brought Partition against *Bury*, who pleaded that they did not hold in Common, and the Jury found that he and his Wife held in Common, and yet the Verdict abated the Writ. *Windham*] You will all grant that the other three have no interest in the Land (*quod Walmisley concessit*) how then can they have *quare clausum fregit*? *Fenner*] Executors shall have *quare clausum fregit*, and yet they have no intetest in the Land. *Rodes*] There they have an interest for the time. *Anderson*] Here is but a bargain, and no interest, and then the three have no colour to bring Trespass, *quare clausum fregit*.

Partition.

Executors.

10.

Avoydance.

THe *Quare impedit* brought by the Queen against the Bishop of *Lincoln* was demurred in Law, and now the Record was read, and day given over to hear the Arguments, but *Fenner* said, that it is all one case with that which hath been adjudged here, *viz.* that the Queen hath title of Lapse, and doth not present, but the Patron presents, and after the Church becomes voyd by the death of the Incumbent, that now the Queen shall not present; but the Court answered, that there the avoydance came by death, but here it cometh by privation, and whether this will make a diversity was the question.

Difference between Death and Privation.

11.

Estate.

HArper brought Trespass against *Spiller* and *Drew*, upon not guilty pleaded, a speciall Verdict was found, and the case in effect was this, *F.* gave Lands to a woman, to have and to hold to her, & to the heirs of *F.* of the body of the woman ingendred; what estate the woman had was the questiou; and now the Record was read, and day given over to argue it.

12.

(10: El: 119.

Amendment.

SHuttelworth moved the Court, and shewed, that one *Brokesby* had brought a *Quare impedit* against the Bishop of *Lincoln*, and others, and the Writ was, *suam spectat donationem*, and this word (*ad*) was omitted, and he prayed the Court that it might be amended, and he cited 11 *Hen.* 6. 2. where it was (*imaginavit*) and it should have been (*imaginat. fuit*) and 13 *Hen.* 7. where the *teste* was omitted, and the Court took time of advisement, and at length by the opinion of all the Justices it was amendable, and then a Clerk of

of the Chancery came into the Court of the Common-pleas, and amended it.

13.

IN an Avowry for an Amercement in a Leet, a Preſcription was made for making of By-lawes, and *Peryam* ſayd that every By-law ought to be made for the common benefit of the inhabitants, and not for the private commodity of any particular man, as *J. S.* onely, or the Lord onely. As if a By-law be made that none ſhall put in his beaſts into the common-field before ſuch a day, this is good; but if a By-law be made, that they ſhall not carry hay upon the lands of the Lord, or break the hedges of *J. S.* this is not good, becauſe it doth not reſpect the common benefit of all: And *Windham* ſayd, that ſome Books are, that they ſhall bind no more than ſuch as agree to them. *By-law.*

14.

HAre brought Debt againſt *Curſon* for a great ſum, and Proceſs continued untill *Capias utleg.* And the Plaintif moved the Court that the Sherif might be commanded to execute the Writ, becauſe they doubted thereof, and the Writ was delivered to the Sherif in Court; and he ſayd that he would doe his endeavour, but *Curſon* hath long kept his houſe, ſo that he cannot come at him. *Peryam*] You may take the power of the Country with you, and break his houſe, and take him out; for ſo it hath been adjudged here, which the Court granted. *Capias utlegatum.*

15.

Pickering ſhewed how an Action of Debt was brought againſt an Adminiſtrator, who pleaded *plene adminiſtravit*, and thereupon the Jury found a ſpeciall Verdict, that certain Obligations made by the Teſtator to the value of a hundred pound were forfeit, and the Adminiſtrator took in the ſaid Bonds, and gave his own Bond for the Debt, and retained the money in his own hands, beſides which, *&c.* he had nothing, *&c.* and if that hundred pound ſhall be liable to this Action of the Plaintif, they prayed the advice of the Court; and by the opinion of *Windham* and *Peryam* it ſhall not be Aſſets, becauſe the property is changed in giving his own Bond for the ſame, and it is, as if he had payd the Debts with his own goods; but if he had compounded for leſs, then the ſurpluſage ſhould have been Aſſets. But *Rodes* was of a contrary opinion in the principall caſe, foraſmuch *Aſſets.* *Payment with proper goods.* *Surpluſage.*

aſmuch as he had payd no money, but onely given his Bond for it, and *Anderſon* was abſent at this day. And after at another day, the caſe was moved again by *Shuttelworth*, and then he ſhewed that for part thereof the Adminiſtrator had given his Bond, and for another part his promiſe, and he ſayd that this is no payment but a compoſition, and therefore no change of property. *Anderſon*] For ſo much as he hath given his promiſe, I think it not good, becauſe that by this promiſe this firſt debt being due by Bond is not diſcharged, but for ſo much as he hath given his Bond for, I hold it good enough, becauſe the firſt Debt is diſcharged thereby, allthongh that the Obligation be made to a ſtranger, by the appointment of the Debtee, and allſo before the Debt due; for by this the firſt Debt is gone. And *Windham* and *Peryam* were of the ſame opinion, that the Debt was diſcharged, and that it ſhould not be Aſſets in his hands, but *Rodes* doubted thereof, and it was adjorned.

Promiſe.

Eſtranger.

16.

Abatement. *John Cleyton* brought an *Ejectione firme* againſt *Lawſell* and *Lawſell* Defendants, and after a Verdict found for the Plaintif, and before Judgement one of the Defendants died, and the Writ was adjudged to ſtand good againſt the other.

17.

Wager of Law. IN Debt by *Saunderſon*, the Defendant pleaded *nil debet per legem*, and in truth the money was due to the Plaintif, but the Plaintif was allſo indebted to the Defendant in the like ſum, and before the Action brought, they were agreed, that each of them ſhould be acquitted againſt the other, and thereupon the Defendant would have waged his Law, and *Anderſon* and *Peryam* doubted much whether he might do ſo, or no; for an accord without ſatisfaction is no plea; and Debt cannot be diſcharged by paroll; but *Rodes* ſayd that it is good by conſent of the parties; and ſo ſayd ſome ſerjeants, and *Fenner* cited 11 *Rich.* 2. *tit. Bar.* 242. where a man hath a Rent by way of Retainer, and *Rodes* cited 22 *Hen.* 6. & 37 *Hen.* 6. Payment by way of Retainer.

Concord.

No diſcharge by word.

18.

Rent ſuſpended. *Edward Sibill* brought Debt againſt *George Hill*, for Rent reſerved upon a Leaſe for years, and the Defendant pleaded, that the Plaintif had entred into part before any rent due, and the iſſue was, *expulit & amovit & adhuc extra tenet*, whereby it is plain, that entry into

into part ſuſpends all the rent. And in *Hill.* Term before in the like caſe for rent reſerved, the Defendant pleaded *nil debet per priam.* and he would have given in evidence an entry before any rent due, *& per Curiam*, he could not doe ſo, but ought to plead it, *ut ſupra*; for it doth not maintain the Iſſue, no more than in the caſe of Waſt, 12 *Hen.* 8. 1. *Pleading.*

19.

IN a *Quare impedit* by *Agnes Kemp* againſt the Biſhop of *Wincheſter*, *Anderſon* told the Jury upon the Evidence given, that if there be four Joyntenants of an Advowſon, and one of them grants over his intereſt, this is good, and the ſurvivor ſhall not hold place. And *Windham* and *Rodes* did not gain-ſay it; and *Peryam* was abſent, but *Fenner* ſpake againſt it, becauſe it is a thing entire, but *Anderſon* clearly to the contrary. *Joynt Advowſon.*

20.

Clunny brought an Action of Debt upon an Eſcape againſt Sir *James Harrington* Sherif of the County of *Huntington*, who pleaded that the Plaintif *dedit concenſum eidem Jacobo*, that the priſoner ſhould goe at large, whereby he did ſo. *Walmiſley*] He ought to plead it by way of licence, and not by conſent. *Curia*] The Plea is good without queſtion, and he may take iſſue thereupon. *Eſcape.*

21.

Taylor brought an Action upon an *Aſſumpſit* againſt *Fulham* for payment of money, and the Defendant pleaded that after the *Aſſumpſit*, the Plaintif releaſed to him all *Aſſumpſits*, and this he pleaded without Deed, and the Court ſayd that this Plea is not good, and they commanded *Shuttelworth* to demur to it, and they would give him expedition; and he demurred to the Plea; and *Anderſon* was very angry with the Serjeant which ſet his hand to the Plea. *Releaſe by word.*

22.

Jane Plain was Plaintif againſt *Sams*, and the Jury found a ſpeciall Verdict, *viz.* that one *Jane Plain* the Mother was ſeiſed in fee, and had iſſue *Elizabeth* and *Jane* now Plaintif, and by Indenture upon conſideration of naturall affection to her two Daughters, *Tenant by curteſie.*

covenanted to ſtand ſeiſed to the uſe of *Elizabeth* in tayl, upon condition following, *viz.* that the ſayd *Elizabeth* the heirs of her body or their Aſſignes ſhould pay to *Jane* (now Plaintif) thirty pound within one year after the death of *Jane* the Mother, or within one year after that *Jane* (now Plaintif) ſhould accompliſh the age of eighteen years, and for default of iſſue in *Elizabeth*, the remainder to *Jane* (now Plaintif) in tayl; *Elizabeth* takes a Husband, and hath iſſue of her body, which dyeth without iſſue, and *Elizabeth* did not pay the thirty pound within the year after the death of *Jane* the Mother; and then *Jane* (now Plaintif) came to the age of eighteen years, and after *Elizabeth* dyed within the year after that *Jane* came to the age of eighteen years, without iſſue, and after the year paſſed, and no money was payd, whereby the Plaintif entred, and if the Husband ſhall be Tenant by the curteſie, was the queſtion; and upon the motion, the Court was clear in opinion, that he ſhall be Tenant by the curteſie; for the condition was gone; becauſe *Eliz.* dyed within the time which ſhe had limited to her for performance therof. And *Anderſon* ſayd, that if an eſtate be determined by limitation, this will not avoyd a Tenancy by the curteſie, but otherwiſe it is if the eſtate be determined by a condition; for this ſhall relate to the defeaſance of the eſtate.

Diſability of performance.

Limitation, condition, difference.

23.

Uſe.

Fecklone ſeme was brought by *Stapley* againſt *Lark*, and upon Evidence the caſe was, that Feoffees ſeiſed to the uſe of *B.* before the Statute of 27 *Hen.* 8. by conſent of *B.* made a Feoffment to another and his heirs, to the uſe of the ſayd Feoffee and his heirs, and the Feoffee had notice of the firſt uſe; now if he ſhall be ſeiſed to his own uſe or no was the queſtion, and all the Juſtices held, that he ſhall be ſeiſed to his own uſe, becauſe the uſe was ſo expreſſed upon the Feoffment. And ſo is the Law if the ſecond Feoffment had been in conſideration of money, allthough no uſe had been limited, yet it ſhould have been to the uſe of the Feoffee and his heirs, and not to the firſt uſe.

Conſideration of mony.

24.

Diſſeiſin.

IT was the opinion of three Juſtices, that if a man levy a Fine, *ſur conuſans de droit come ceo que il ad de ſon don. &c.* and after continue poſſeſſion, that yet he is a Diſſeiſor, and not Tenant at will or ſufferance, and that a *Precipe* lyeth againſt him.

De

De Term. Paſch. Anno xxx Eliz. *Reg.*

1.

IN a Writ of Annuity, it was the opinion of the Juſtices, that if one grant a Rent charge to *B.* which is paid to him, and after *B.* grants it over to *C.* and the Tenant of the Land attourneth, that now *C.* ſhall not have his election to make his an Annuity, but ought to take it as a Rent charge. *Rent charge.*

t

2.

THomas *Michell* brought debt upon an Obligation againſt *Stockwith* and *Andrews*, and the Jury found a ſpeciall Verdict, *viz.* that after the iſſue joyned, and before the *niſi prius*, the ſeal of *Andrews* was fallen off, *& ſi, &c. Windham*] A caſe hath been adjudged here, that where a Bond was delivered to the *Cuſtos brevium* to be kept, and the Miſe broke the ſeal, and the Court adjudged that the Plaintif ſhould be at no prejudice thereby. And here inſomuch that no fault was in the Plaintif, the Court awarded that he ſhould recover, and Judgement was entred accordingly. *Seal fall off after iſſue.* *Cuſtos brevium.*

3.

WIghtman is Plaintif againſt *Chartman*. And the caſe was this, two were bound in an Obligation *& quilibet eorum conjunctim*, and the Action was brought againſt one alone, and the opinion of the Court was, that it is not maintainable, by reaſon of this word *conjunction*. *Conjunctim.*

4.

WAlmiſley moved concerning the *Quare impedit* brought by the Queen. And he thought that ſhe ſhall recover, for the avoidance is by Privation, and the ſame party is preſented again, and and if theſe ſhifts may be uſed, the Queen ſhall never have a Lapſe, for then the Incumbent ſhall be deprived, and the ſame Incumbent preſented: *Fenner* to the contrary, and ſaid that where her title is reſtrained to a time, there ſhe ſhall have no Prerogative, to the preju- *Avoidance.*

dice of a third perſon, nor to alter their Eſtates. And for that in 1 *Ed.* 3. if the King have a Lordſhip and Rent, and he grant the Lordſhip over, and retain the Rent, and after the Land eſcheats, the Rent is gone, as in the caſe of a common perſon, and the Queen ſhall have the year, day, and Waſt; but if Tenant for life dy, ſhe ſhall not have it; And in Dower againſt the Guardian, if the Heir come to full age the Writ ſhall abate.

The year day and Waſt.

Dower againſt Guardian.

5.

Bankrupt.

AN Action upon the caſe was brought for calling the Plaintif Bankrupt, and a Verdict paſſed for the Paintif. And now *Shutleworth* ſhewed in arreſt of Judgement, that the Plaintif had not declared that he was a Merchant, or of any Myſtery or trade. And the Court held the Declaration inſufficient for the ſame cauſe, and made a rule for ſtay of the Judgement accordingly.

6.

Diſcent of a third part.

IN a Replevin brought by *Mary Colthirſt* againſt *Thomas Delves*, it was agreed by three Juſtices (*Anderſon* being in the Starchamber) that if a man have Lands held in chief to the value of 60. l. that he may Deviſe Lands to the value of 40. l. if he ſuffer the reſt to the value of 20. l. to deſcend to his Heir; And therefore they overruled it upon evidence to the Jury, that where one *Barners* was ſeiſed of the Mannor of *Toby*, in the County of *Eſſex*, and was allſo ſeiſed of the Mannor of *Hinton* in the County of *Glouceſter*, and all thoſe were held by Knights ſervice in chief, and deviſeth the Mannor of *Toby* to his Wife for life, that his Heir at the Common Law ſhall have no part thereof, if the Mannor of *Hinton* amounteth to the third part of all his Lands. Allſo they overruled, that if a man after Mariage convey a Joynture to his Wife, and dy, that after the Wife may refuſe the Joynture, and demand her Dower at the Common Law. Allſo that by refuſall in the Country, ſhe may wave her Joynture, and hold her to her Dower, and that this is a ſufficient Election. Allſo they held that if a man makes a Joynture to his Wife during the Coverture, and after by his Teſtament deviſeth other Lands to her in ſtead of her Joynture, that ſhe may refuſe the Joynture, and hold her to the Deviſe, and that this ſhall be good by the Statute, (and yet *Gawdy* moved to the contrary, becauſe the Statute is, that ſhe may refuſe the Joynture and hold her to the Dower,) but the three Juſtices overruled it clearly, and ſaid, that ſuch was the meaning of the Statute, but they agreed, that if ſhe have once agreed to the Joynture, that ſhe cannot waive it afterwards. Allſo they agreed that if a

Entire Mannor.

Refuſall of Joynture.

Deviſe for Joynture.

No waiving after agreement.

Wife

Wife do once refuſe her Joynture in her own houſe amongſt her ſervants, and not to the Heir, that yet this is a good Refuſall. And *Peryam* ſaid for Law, that where a Joynture is conveyed to the Wife during the Coverture, and after the death of her Husband ſhe ſay nothing, but bringeth a Writ of Dower, that this is a good Refuſall, aud ſo he hath ſeen in experience. *Refuſall by bringing Dower.*

7.

AN Action upon the caſe was brought by *John Cuttes* againſt an antient Attourney of the Court, for theſe words, *viz.* *John Cutts* was one of thoſe which robbed *Humphrey Robbins.* And they were at iſſue, and it was found for the Plaintif. And it was alleged in arreſt of Judgement, that the words were ſpoken in Queen *Maries* time, as appeareth by the Declaration. And yet the opinion of the Court was, that he ſhould have his Judgement, allthough peradventure robberies were pardoned by Parliament after that time. *Slander.*

8.

Carleton brought Entry *ſur diſſeiſin* againſt *Carre*, who for part pleaded that he had nothing but in Right of his Wife, not named, *&c.* and ſo demanded Judgement of the Writ, and for the reſt he pleaded in bar, and they joyned iſſue for both, and the Jury appeared at the bar, and found both the iſſues for the Defendant. And now the queſtion was, whether the Writ ſhall abate for all or no, becauſe for part it was found that the Defendant had nothing but in right of his Wife, or whether it ſhall abate but for this part onely? And *Shuttleworth* argued that it ſhould abate for part onely, and he reſembled it to Joyntenancy, in which caſe it ſhall abate but in part, and he cited *Dier.* 291. & 7 *R.* 2. *titulo joint.* 8. & *E.* 1. *titulo breif* 860. And *Walmiſley* ſaid, that it was more like to a ſeverall Tenancy, in which caſe all ſhall abate, as in *non tenure*; but *Peryam* ſaid to him, put a caſe, where ſeverall Tenancy ſhall abate all the Writ. *Anderſon*] Joyntenancy, and ſeiſed in right of his Wife is all one to this effect and intent, for in Joyntenaney he confeſſeth that he is ſufficient enough, but that another hath right as well as himſelf allſo. And ſo where he confeſſeth that he is ſeiſed in right of his Wife, he confeſſeth that he is Tenant, but that another ought to be named with him. *Peryam*] True it is, that there is no difference concerning this purpoſe and intent, and if the Recovery be had againſt the Husband ſole, he ſhall be bound, And at length, all the Iuſtices agreed, that the *Abatement for part.* *Severall Tenancy.* *Joyntenancy.*

 Writ

Writ ſhall abate but in part, and that Judgement ſhall be given for the reſt, and ſo for that reſidue the Judgement was, *nihil capiat per breve. vide* 3 *Hen.* 4. 2. 13 *Eliz.* fol. 301.

9.

Lapſe. AT this day *Walmiſley* prayed Judgement in the *Quare impedit* for the Queen. *Anderſon*] we are all agreed that the Queen ſhall have Judgement for the reaſon of the miſchief; For otherwiſe, when the Queen hath a Lapſe divolved unto her, one ſhall be Preſented, and afterwards deprived, ſo that the Queen ſhall never have her Lapſe. And it differeth much from the caſe of that avoidance which cometh by the Act of God; for this is by the Act of the party, and therefore Covenous. And ſo let Judgement be entred for the Queen.

10.

A Writ was (*ad reſpondendum I. S. & Fidei uxori ejus*) and the Defendant pleaded in abatement of the Writ, becauſe the name of the Wife was *Faith* in Engliſh, therefore they pretended that it ſhould be *Fidi. Rodes*] I know a Wife which is called *Troth* in Engliſh, and ſhe was called *Truthia* in Latin, and it was good. And all the Court adjudged this Writ good here.

11.

Hue and cry. AN Action upon the Statute of *Winch.* was brought againſt a hundred in *Glouceſter*, and the Jury found a ſpeciall Verdict, *viz.* that the money was delivered to a Carrier of *Briſtow*, to be carried to *London*, who packed it up; And as he was on his journey, certain Malefactors came to him, in an another Hundred, and there took his Horſe and Pack, and led him into a Wood, within this Hundred, againſt which the action is brought. And if this Hundred be guilty or no, they prayed the adviſe of the Court; And all the Jnſtices agreed, that this was a robbery in the firſt Hundred, and not in the ſecond, for upon the firſt taking he was robbed; but if the Carrier had led the Horſe himſelf, then it ſhould be adjudged to be in his own *Poſſeſſion.* poſſeſſion, and no robbery untill he came into the ſecond Hundred, and if a man have money, and the Malefactors take him in one Hundred, and carry him unto another Hundred, and there Rifle him, this ſhall not be a robbery in the firſt, but onely in the ſecond Hundred, for he is allwaies in poſſeſſion, *per totam Curiam*, and Judgement was given accordingly. So of the purſe picked in the Kings Bench, and the

the thief taken with the manner, but a key being faſtened to the purſe, ſtill ſtuck in the pocket, and 2 Juſtices againſt two, that the man was ſtill in poſſeſſion of his purſe, and ſo no robbery.

12.

Termor.

Walmiſly ſhewed, how a woman brought Dower againſt her two daughters and another, and in truth the third was but a Termer, and the Wife hath no cauſe of dower but that this was onely to make the Termer to loſe his term, for they all have made default at the grand cape, and now he prayed to be received, and ſhewed cauſe that the Husband made a leaſe for yeares, and after the Leſſee levied a fine to the Leſſor, and they granted and rendred back again to the Leſſee for the ſame yeares rendring the ſame rent, and the Statute of *Glouceſter* is, if the Farmour have, *&c.* that is, if he may have covenant, as in 19 *Ed.* 3. and here he may have covenant, and prayed to be received, and ſhewed his plea. *Shuttleworth*] You are at no miſchief, for you ſhall have an *ejectione firme* if you be ouſted, where ſhe hath no cauſe of Dower. *Walmiſley*] But we ſhall be put out of poſſeſſiion, which ſhall be no reaſon. *Anderſon*] I hold that a Termer may falſify by the Common law. *Shuttleworth*] But his leaſe is after our title of dower. *Peryam*] although that it be after, yet if he have matter which goeth in deſtruction of the Dower, he ſhall falſify well enough, as if ſhe have title of Dower and five yeares paſs after the fine levied. And *Anderſon* and *Peryam* ſaid that the Statute of *Glouceſter* was made that a Termer ſhould not be put out of poſſeſſion, but here the Termer is named, *ideo quare*, And after at an other day *Shuttleworth* moved it again, and ſaid that the Termer ſhall not be received, becauſe he is named in the Writ, and the Court was of the ſame opinion then, but they ſaid that he might plead ſpeciall non tenure. *Shuttleworth*] firſt he ought to ſave his default, for he commeth in upon the grand cape. *Rodes* by 33 *H.* 6. 2. he may plead non tenure before default ſaved by *Priſot* there. *Shuttleworth*] Then I ſhall have judgement againſt the two which made default at the grand cape. *Curia*] you had beſt be adviſed, leſt the Writ ſhould abate by non tenure of parcell. *Shuttleworth*] by my Conuſance of non tenure of parcell, all ſha.l abate, but if I demurr upon his plea, then it ſhall abate but for one parcell.

Ejectione firme.

Falſify.

Leſſer may plead deſtruction of dower.

Reſceit of the partie to the Writ.

Conuſance Cemurrer Difference.

Writ ſhall abate but in part, and that Judgement ſhall be given for the reſt, and ſo for that reſidue the Judgement was, *nihil capiat per breve. vide* 3 *Hen.* 4. 2. 13 *Eliz.* fol. 301.

9.

Lapſe. AT this day *Walmiſley* prayed Judgement in the *Quare impedit* for the Queen. *Anderſon*] we are all agreed that the Queen ſhall have Judgement for the reaſon of the miſchief; For otherwiſe, when the Queen hath a Lapſe divolved unto her, one ſhall be Preſented, and afterwards deprived, ſo that the Queen ſhall never have her Lapſe. And it differeth much from the caſe of that avoidance which cometh by the Act of God; for this is by the Act of the party, and therefore Covenous. And ſo let Judgement be entred for the Queen.

10.

A Writ was (*ad reſpondendum I. S. & Fidei uxori ejus*) and the Defendant pleaded in abatement of the Writ, becauſe the name of the Wife was *Faith* in Engliſh, therefore they pretended that it ſhould be *Fidi. Rodes*] I know a Wife which is called *Truth* in Engliſh, and ſhe was called *Truthia* in Latin, and it was good. And all the Court adjudged this Writ good here.

11.

Hue and cry. AN Action upon the Statute of *Winch.* was brought againſt a hundred in *Glouceſter*, and the Jury found a ſpeciall Verdict, *viz.* that the money was delivered to a Carrier of *Briſtow*, to be carried to *London*, who packed it up; And as he was on his journey, certain Malefactors came to him, in an another Hundred, and there took his Horſe and Pack, and led him into a Wood, within this Hundred, againſt which the action is brought. And if this Hundred be guilty or no, they prayed the adviſe of the Court; And all the Jnſtices agreed, that this was a robbery in the firſt Hundred, and not in the ſecond, for upon the firſt taking he was robbed; but if the Carrier had led the Horſe himſelf, then it ſhould be adjudged to be in his own *Poſſeſſion.* poſſeſſion, and no robbery untill he came into the ſecond Hundred, and if a man have money, and the Malefactors take him in one Hundred, and carry him unto another Hundred, and there Rifle him, this ſhall not be a robbery in the firſt, but onely in the ſecond Hundred, for he is allwaies in poſſeſſion, *per totam Curiam*, and Judgement was given accordingly. So of the purſe picked in the Kings Bench, and the

the thief taken with the manner, but a key being faſtened to the purſe, ſtill ſtuck in the pocket, and 2 Juſtices againſt two, that the man was ſtill in poſſeſſion of his purſe, and ſo no robbery.

12.

Termor.

W*Almiſly* ſhewed, how a woman brought Dower againſt her two daughters and another, and in truth the third was but a Termer, and the Wife hath no cauſe of dower but that this was onely to make the Termer to loſe his term, for they all have made default at the grand cape, and now he prayed to be received, and ſhewed cauſe that the Husband made a leaſe for yeares, and after the Leſſee levied a fine to the Leſſor, and they granted and rendred back again to the Leſſee for the ſame yeares rendring the ſame rent, and the Statute of *Glouceſter* is, if the Farmour have, *&c.* that is, if he may have covenant, as in 19 *Ed.* 3. and here he may have covenant, and prayed to be received, and ſhewed his plea. *Shuttleworth*] You are at no miſchief, for you ſhall have an *ejectione firme* if you be ouſted, where ſhe hath no cauſe of Dower. *Walmiſley*] But we ſhall be put out of poſſeſſiion, which ſhall be no reaſon. *Anderſon*] I hold that a Termer may falſify by the Common law. *Shuttleworth*] But his leaſe is after our title of dower. *Peryam*] although that it be after, yet if he have matter which goeth in deſtruction of the Dower, he ſhall falſify well enough, as if ſhe have title of Dower and five yeares paſs after the fine levied. And *Anderſon* and *Peryam* ſaid that the Statute of *Glouceſter* was made that a Termer ſhould not be put out of poſſeſſion, but here the Termer is named, *ideo quare*. And after at another day *Shuttleworth* moved it again, and ſaid that the Termer ſhall not be received, becauſe he is named in the Writ, and the Court was of the ſame opinion then, but they ſaid that he might plead ſpeciall non tenure. *Shuttleworth*] firſt he ought to ſave his default, for he commeth in upon the grand cape. *Rodes* by 33 *H.* 6. 2. he may plead non tenure before default ſaved by *Friſot* there. *Shuttleworth*] Then I ſhall have judgement againſt the two which made default at the grand cape. *Curia*] you had beſt be adviſed, leſt the Writ ſhould abate by non tenure of parcell. *Shuttleworth*] by my Conuſance of non tenure of parcell, all ſha.l abate, but if I demurr upon his plea, then it ſhall abate but for one parcell.

Ejectione firme.

Falſify.

Leſſer may plead deſtruction of dower.

Reſceit of the partie to the Writ.

Conuſance Demurrer Difference.

13.

Eſtoppell.

Leonard White brought a Formdon in Diſcender, and declared of a gift in tayl made to his father, who died, and the land deſcended to the elder brother of the Demandant, who alſo died without Iſſue, and ſo conveyed to himſelf as heir in tayl, *&c.* The Tenant pleaded that the elder brother had Iſſue a Daughter, who levied a fine to him, and he relied upon the fine and proclamation. *Walmiſly*] this Plea is double, the one is the Iſſue, the other the fine. *Curia*] foraſmuch as he cannot come to the one without ſhewing the other, it ſhall not be double, & alſo here he relieth upon the Eſtopple, *vide* 18. *E.* 3. 25. *Tit. Gard. per Wylly.*

Inducement doth not make a plea double.

14.

Aſſets in Gavelkind.

A Formdon in deſcend by three brethren for lands in *Gavelkind*, they were at Iſſue upon Aſſetz deſcended to the Demandants, And the Jury found a ſpeciall Verdict, that the Father of the Demandant was ſeiſed of thoſe lands, and by his Teſtament deviſed them to his three ſonnes now Demandants, and to their heires equally to be divided, And if this ſhall be ſaid a deſcent to them or no was the queſtion, becauſe the Law would have done as much, and therefore it ſhall be ſaid Aſſetz. But all the Court held the contrary, and that they ſhall be joynt-Tenants or Tenants in common, and then they ſhall not be in by the deſcent, and ſo no Aſſetz; and *Anderſon* ſaid, that if a man deviſe to his ſonne and heir in tayl, he ſhall not take it by deſcent. *Peryam*] if a man may have any more benefit by the Deviſe than by the deſcent, then he ſhall take by the Deviſe, *Eadem lex per Curiam* if he deviſe his lands to his two daughters and heires, they ſhall be joynt-Tenants and no coparceners, *è contra* if he have but one ſon or one daughter only.

15.

Venue.

IN the Exchequer Chamber all the Juſtices of the Common Pleas, and the Barons of the Exchequer, were aſſembled according to the Statute of 27. *Eliz.* to reform errors in the Kings bench. And *Smalteman* of the inner Temple ſhewed how an Action of Debt was brought upon an Obligation againſt one *Cheney* as adminiſtrator, who pleaded *plenè adminiſtravit*, and the action was laid in *Barkſhire* at *Newbery*, and the Plaintif averred that the Defendant had Aſſetz at *Weſtwood* in the ſame County, and the *venire facias* was of *Newberry*, whereas it ſhould have been of *Weſtwood*. And this he aſſigned for

for Error, And all the Court agreed *una voce* that it was Error, and ſo the judgement was reverſed, but the Aſſetz being tranſitory might have been aſſigned at *Newbery*.

17.

Amendment.

ANother Writ of Error was there brought by the Lord *Seymour* againſt Sr. *John Cliſton* upon a judgement given againſt him, and aſſigned for error that the judgement was *quod recuperet verſus Edward. Seymour*, and did not ſay *prædict. Edward. Seymour*. And all the Juſtices agreed that this was amendable, And ſo the firſt judgement was affirmed.

18.

Rent ſuſpended.

ANother Writ of Error was there brought upon a judgement which *Rawlyns* had to recover lands in the Kings bench, and the Caſe was ſuch. A man makes a leaſe of ten acres for ten yeares rendring rent upon a Condition; the Leſſee grants 5. acres thereof to a ſtranger for five yaers; and after grants the reſidue of the years in the five acres to the Leſſor. And after the Leſſee broke the Condition, whereby the Leſſor re-entred; and if he may do ſo, or if the Condition was ſuſpended, or no, was the queſtion, becauſe he accepted a future intereſt in parcell; for it was adjudged in the Kings bench that the Condition was not ſuſpended, and now this was aſſigned for error, And all the Juſtices (except. *Anderſon* and *Peryam*) held that it is not ſuſpended before he had entred by force of his leaſe *Anderſon*] If I make a leaſe (as here) upon Condition and waive the poſſeſſion, this may be ſuſpended before his entrie. *Cook*] This is another caſe. *Peryam*] But the reaſon thereof commeth well to this caſe; And afterwards becauſe the ſaid two Juſtices diſ-aſſented from the reſt, it was adjourned over.

Future intereſt. Tenant wayves

19.

Trover.

ANother Writ of Error was there brought upon a judgment given in the Kings bench. And *Cook* the famous Utter-Barreſter of the Inner-tem. moved this queſtion to the Juſtices. If a man loſe his goods, which come to the hands of another, & he converteth them to his own uſe, and after the owner dye, whether his Executors ſhall have an action of the Caſe for this Trover, and whether he ought to ſhew the place and the day of the Converſion, or no; And the Counſellours at the bar ſaid that he ought to ſhew both, for ſo it was adjudged, where

Day and place of converſion.

an Alderman of London brought an action upon the Case against one *Staynsham* upon Trover of an Obligation, and it was found that he had broken the seales, *&c.* and becauſe he did not ſhew the time and place of the Converſion, he could never get Judgement. And now the Juſtices were of the ſame opinion, but yet *Anderſon* ſeemed to doubt. *Peryam*] Executors at the Common Law ſhall not have Treſpaſs for a Treſpaſs done in the life of their Teſtator, and the doubt is if they ſhall have an Action upon the Caſe. *Manwood*] if a man hath another in Execution for debt, and the Gaoler ſuffer him to eſcape, and after the Recoverer dyes, ſhall his Executors have an action againſt the Gaoler? *Cook*] No. *Peryam*] So it ſeemeth. But *Anderſon Manwood* and *Windam* clearly to the contrary, and that they ſhall have debt upon this Eſcape. *Cook*] But not an Action upon the Caſe at the Common Law; and here by his own ſhewing he might have Treſpaſs *vi & armis*, and therefore not this action.

De Term. Trinitat. An. Reg. Eliz. xxxx.

I.

Dyott. RAlph *Heidon* brought a Writ of Right againſt *Smethwick* and his Wife, of two parts of forty Acres of Land in *Surret*, and they pleaded that one *Ibgrave* was ſeiſed, and devised it to his Wife, now one of the Tenants for term of her life, the remainder to *Benjamin Ibgrave* in fee, which was his heir, and dyed, and they prayed in ayd of *B. I.* who came and joyned to them, and thereupon they came and pleaded to the grand Aſſiſe, and the firſt day of this term the Aſſiſe appeared, and ſixteen were ſworn, whereof four were Knights, and the reſidue were Squires and Gentlemen, and the title was all one, as before in *T.* 28 *Eliz.* for this ſame *Ibgrave* was Tenant in that other Action for the third part. And the opinion of all the Court clearly, that it is not ayded by the Statute; for there is not any certainty in the Grant; but if he had given it a certain name, as green Acre, then allthough he had miſtaken the Pariſh, yet it had been good enough. *Peryam*] The Aſſiſe may goe their way, and they did ſo, and after they being agreed came again to the Bar, and the Demandant was called, and did not appear, whereby the Tenant prayed the Court to record the Nonſuit, and it was done. *Curia*] All is one as if he had appeared; for this Non-ſuit is peremptory for ever; the iſſue being

Praying ayd in an Aſſiſe.

Name certain.

Non-ſuits.

being joyned upon the meer *droit*, *aliter* if the iſſue had been joyned upon any collaterall poynt.

2.

IN Treſpaſs by *Blunt* and *Liſter* againſt *Delahere* they were at Iſſue' and now the Inqueſt appeared ready to paſs. *VValmiſley*] This Inqueſt you ought not to take, for it is favourably made by the Sherif, which is within the diſtreſs of one of the Plaintifs, and ſhewed, how the Sherif held certain lands of a Mannor now in queſtion, whereof *Liſter* hath poſſeſſion, and alſo hath certain lands for term of years of him; and the Plaintifs moved that he ought to take one cauſe onely. *Curia*] He may allege both; for the challenge is, that he is within the diſtreſs, and the allegations are but evidence to prove it; and then the Plaintif ſayd, not within his diſtreſs, whereupon the Court appointed Tryers; and the Defendant ſayd that all the Jury are favourable, and prayed Tryers *de circumſtantibus*. *Gawdy*] That cannot be, but onely in an Aſſiſe, and cited 9 *Edw.* 4. *Curia*] We cannot appoint other Tryers in this caſe but only of the Jurors, wherefore let the fourth and ſeventh be Tryers, but you may refuſe them, and take others if you will, and thereupon the Defendant refuſed the fourth whereby the third was appointed, and they found the Array favourably made, and therefore it was quaſhed.

Challenge.

1 *Cauſe.*

Tryors refuſed.

3.

A Recovery was had by *Arthur Mills* againſt Sir *Owen Hopton*, of divers lands twelve years paſſed, and by the negligence of the Attorney, no Warrant of Attorney was entred for him, and now ſuit was made to the Juſtices that it might be entered; and they all conſented thereunto, and ſo it was entered incontinently; but firſt the party made a corporall Oath, that he had retained an Attorney, and that this was the negligence of his Attorney.

Amendment

Warranty of Attorney.

4.

IN the Exchequer chamber *Cook*, ſhewed that a Writ of Error was brought between *Bedell* and *Moor*, and ſayd that there was an Error in the Record, which was not aſſigned, and prayed that it might be examined, allthough that it was not aſſigned, becauſe that it appeared in the Record, which was agreed to by the Court. And then he ſhewed the caſe, that two had ſubmitted themſelves for all quarrels *ultimo die Novembris An.* 24. to ſtand to the Arbitrement of two others, and they Arbitrated that the Plaintif in this Writ of Error, ſhould

Arbitrement.

Error not aſſigned.

should releaſe to the now Defendant all Actions which he might have againſt him untill the 24 of *June* then next following, which was half a year after, and becauſe he had not performed this, an action upon an *Aſſumpſit* was brought, and Judgement given for the Plaintif, and all the Juſtices agreed that this was Error, becauſe that this thing arbitrated was out of the ſubmiſſion, and ſo voyd; for they have no authority to arbitrate that which is not ſubmitted unto them, and the ſubmiſſion is onely of things paſſed, and not to come; but becauſe that the Defendant had not heard of this Error before, therefore they gave him day. Afterwards the caſe was moved again; and *Anderſon* ſayd that damages recovered doe not lye in arbitrement. *Feryam*] Amongſt other things they will lye well enough, *quod Anderſon non negavit*. But they all ſayd, that they may well aſſume upon conſideration, and an Action will be maintainable for it.

Submiſſion.

Damages recovered.

5.

Term extinguiſhed.

THomas *Mounſon* Eſquire, ſonne and heir apparent to Sir *John Mounſon*, Knight, brought an Action of Treſpaſs againſt *VVeſt*, who pleaded not guilty, and upon Evidence it appeared, that Sir *John Mounſon* had an eſtate for years, the Remainder in tayl to the Plaintif, with divers Remainders over, and the Leſſee made a Feoffment to divers, and a Letter of Attorney to others, with commiſſion to enter into the lands, and to ſeal the Feoffment, and deliver it in his name to the uſe of the ſayd *Thomas* and his heirs, and another by commandement, or Letter of Attorney of the ſayd *Thomas* entred in his name. And the Court held this a good Feoffment, notwithſtanding that both the Leſſee and the Attorney were diſſeiſors; for it is good between the Feoffor, and the Feoffee; for they ſayd that by the Feoffment to the uſe of him in the remainder and his heirs, if he in remainder enter, he is remitted, and the eſtate for years is gone implicatively; for *Feryam* ſayd, that in all caſes where the Freehold cometh to the term, there the term is extinguiſhed. And therefore if a man morgage his reverſion to the Leſſee for years, and after perform the condition, yet the Leaſe for years is utterly extinguiſhed: And the Evidence on both parts was very long, and the chief matter was, whether a Deed were forged by *Rob. Mounſon* lately one of the Juſtices of the Common-pleas; by which Deviſe lands were conveighed to him by *William Mounſon* his Father, whoſe heir at the Common Law Sir *John Mounſon* is, *viz.* the Sonne of *Roberts* eldeſt brother, and the Deed was ſhewed by *VVeſt*, and it was periſhed with Mice, all the Seal, and part of every ſide; but yet by the laſt Will of the ſayd *VVilliam Mounſon*, and by divers other proofs, it was evident that the

Diſſeiſors.

Freehold joyned to the term.

Morgage.

the Deed was good, and but little in effect was ſhewed to prove the Deed forged; yet the Jury went together, and tarryed there all night, and in the mean time ſome of them had victualls with them; for one had Cheeſe, and another had Pruens, another had Pippins, and another had an Orange, but he which had the Orange ſwore that he brought it onely for the ſmell, and therefore he was excuſed; and he which had Pruens, had given half a Pruen to one of his companions, which eat it, and he which had Cheeſe had eat thereof, therefore all thoſe which had victuals, were fined at 40 ſ. and they which had eaten at 5 l. every of them, and all committed to the Fleet; but becauſe they were agreed, therefore the Verdict was taken, and the Verdict was given for the Plaintif, *viz.* that the Deed was forged by Juſtice *Mounſon*, and the Verdict taken *de bene eſſe*, and all this matter commanded to be entred; for the Juſtices doubted whether it were a good Verdict. This matter was moved divers Terms afterwards, and at the laſt adjudged a good Verdict.

Miſdemenour.

Fine and impriſonment.

6.

IN an *Ejectione firme* by *Aſhby* againſt *Laver* for Lands in *Weſtminſter*, it was ſayd by all the Juſtices to the Jury, that if a man hath a Leaſe, and diſpoſeth of it by his will, and after ſurrenders it, and takes a new Leaſe, and after dyeth that the Deviſee ſhall not have this laſt Leaſe, becauſe this was a plain countermand of his Will.

Countermand.

7.

IN Treſpaſs by *Johnſon* againſt *Aſtley*, it was ſaid by the Juſtices to the Jury, that if there were a Chauntery in reputation, allthough it be none in right (as if it be gone by diſſeiſin) yet the Queen ſhall have the Lands.

8.

AT Serjeants-Inne in *Fleet-ſtreet*, the Juſtices of the Common Pleas, and Barons of the Exchequer, were aſſembled for divers Errors in the Kings-bench, and the caſe of *Rawlins* was moved again, and *Anderſon* and *Peryam* retained their former opinions, and *Peryam* ſayd, that he would differ from all the caſes of collaterall conditions, which may be put; for he ſayd that if a man make a Feoffment in fee of 20 Acres of land, upon condition, that if he pay to the Feoffee xx l. at *Eaſter*, that then it ſhall be lawfull for him to re-enter

Rent ſuſpended.

Feoffment upon condition.

re-enter, allthough that he be re-enfeoffed of 10 Acres, yet he ought to perform the condition, becauſe it is collaterall. But *Cook* the famous Utter-barriſter ſayd, Truly it hath been adjudged to the contrary, and I was privy to it; for when he took as high an eſtate again as he had before, by that the condition is confounded, and the caſe of the *Corody* in 20 *Ed.* 4. will prove this caſe. *Rodes*] I ſee no diverſity. *Peryam*] It is collaterall there, but ſo it is not here, but afterwards thoſe two Judges changed their opinions, and ſo the firſt Judgement was affirmed.

9.

Conſideration.

Brown recovered againſt *Garbrey* in an *Aſſumpſit*, and thereupon *Garbrey* brought a Writ of Error, and aſſigned for Error, that there was no Conſideration; for the Declaration was, that whereas there was a communication between *Brown* and a woman, for Mariage between them, that the Father of *Brown* had promiſed to the Wife, that if ſhe would marry his Son, he would make a Feoffment of his land to the uſe of himſelf for life, and after to the uſe of them two in tayl, the remainder, *&c.* and that *Garbrey* aſſured to the Wife *in conſideratione premiſſorum*, that if the Father did not doe ſo, then he would give the Wife a hundred pound; *ac licet*, the Father did not give to them in tayl, *ſecund. agreament. predict.* yet *Garbrey* refuſed, *&c.* And *Cook* moved that this ſhould be no Conſideration; for the communication of Mariage was not by him, but between ſtrangers to him; but if the Father had aſſumed in conſideration of Mariage, then that ſhould have been good againſt the Father; but againſt *Garbrey* it is no otherwiſe than as if one promiſe to you to Enſeoff you, and I ſay that if he doe not ſo, then I will give you a hundred pound, this is without conſideration, and ſo here. But the Juſtices held the contrary, and that the conſideration is good; for *in conſideratione premiſſorum*, is in conſideration of the Mariage, as well as of the refuſall of the Father; and allſo it was alleged, that *Garbrey* was Coſen German to *Brown*, and therefore, *&c.* *Anderſon*] If a communication be between two, and the Father promiſe to make a Joynture, and a ſtranger ſay that if the Father will not, then he will doe it, this is a good conſideration; and there is no neceſſity to be ſo curious in the conſideration; for that is not traverſable. But *Cook* ſayd, that if it be Executory, then it is traverſable. Another Error *Cook* aſſigned, becauſe they had not alleged a not performance in the Father; for the promiſe of the Father was to make a Feoffment to the uſe, *&c.* and they averre that allthough that he did not make a gift in tayl, which cannot be the ſame thing which the Father ſhould doe; for an eſtate to uſe in tayl,

Conſideration executory traverſable.

and

and a gift in tayl is not all one. But the Juſtices held it good, for by the Statute of 27 *H.* 8. the uſe is executed, and ſo the eſtate executed. Alſo the Declaration was that he had not made a gift in tayl *ſecundum agreamentum predictum*. But *Cook* moved that it ſhould not be good, for if a man be bound to make an eſtate to another in the *per*, and he make it in the *poſt*, this is no performance, and here by the Statute he is in, in the *poſt*, and the not performance is alleged to be, becauſe he did it not in the *per*, and ſaith, that he which is in by the Statute, ſhall not vouch, for he is in, in the *poſt*, and he cited *Winters* caſe, which was not denyed; but *Peryam* ſaid, that conſiderations in actions upon the Caſe, and Conditions, are not all one.

9.

Coppyhold.

IN the Kings bench the caſe was ſuch, *John Kipping* being a Copiholder, deviſed it to his Wife for life, the Remainder to *VVilliam* his ſon in Fee, and made a Surrender to that uſe, and the Wife is admitted generally, now if this be an admittance of him in Remainder alſo, was the queſtion. And *Godfrey* argued that it was not, for it is not like to the caſe of deſcent, where the reverſion ſhould have deſcended, for in this caſe *VVilliam* cannot Surrender before admittance, but he agreed that one which hath it by diſcent may ſurrender before admittance for in that caſe it ſhall be ſaid *poſſeſſio fratris*, but when it is by purchaſe then that cannot be ſurrendred, whereof admittance ought to be, becauſe the Lord ought to have a fine of him, & therefore he likened it to the caſe in 18 *E.* 4. where the Meſne graunts the Meſnality for life, the remainder in fee, and the Tenant attornes to the Tenant for life, if he had cauſe of acquittance againſt the Meſne this ſhall not be an attornment to him in remainder; ſo here, if this ſhall be good to him in remainder then is the Lord without remedy for his fine. But *Cooke* the famous Utter-Barriſter argued to the contrary; for the Remainder veſted when the particular eſtate veſted, or els it ſhall never veſt, but it ſhall not be void, *ergo* it is excuted when the particular eſtate, *&c.* And therefore he ſaid clearly that an admittance of the particular Tenant is an admittance of him in Remainder, and that the Lord cannot have his fine, if it be agreed that the Heir may ſurrender before admittance, and yet the Lord ought to have a fine of him. And in 7 *Ric.* 2. *Fitzherbert ſcire facias* 3. where Tenant for life ſueth execution, this is an execution for him in Remainder. And in *Fitzherbert. Na. Br.* fol. 201. where one deviſeth for life, the Remainder in tayl, and an *ex gravi querela* was ſued, this ſhall ſerve as well for Tenant in Remainder as for Tenant for life, and 18 *Ed.* 4. 7. and the time of *Ed.* 4. *Fitzherbert Attorn.* 21. that attornment to the Tenant for life is good to him in

Generall admittance.

Surrender.

Meſne.

Veſting of a remainder.

Scire facias upon a fine.

Audita querela

Attornment.

Assent to the Devisee. in Remainder and *VVeldons* case in the Commentaries, that assent to the Devisee for life, is an execution of the devise to him in the Remainder.

Resceit.

11.

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THe case of the Resceit was moved again, and *Shuttleworth* said, that he cannot be resceived because he is named in the Writ, And said, that he had searched all the books, and there is not one Case where he which is named in the Writ, may be resceived. *Anderson*] What of that? shall not we give judgement because it is not adjudged in the bookes before? wee will give judgement according to reason, and if there bee no reason in the bookes, I will not regard them. *Shuttleworth*] Hee is at no mischief here, for in 33 *H.* 6. the Tenant came at the grand cape, and said that he had nothing, and the Court said that it was no plea, for if he hath nothing he can lose nothing, And so here, if he be ousted where he hath good right, he may re-enter, and falsify the recoverie. *Peryam*] But he shall be put out of possession, which is a mischief and remedied by the Statute. *Shuttleworth*] I hold clearly that a Termer cannot falsify at the Common Law, because a term was not regarded. *Peryam*] The books doubt thereof, but *Anderson* seemed to assent to *Shuttleworth*, and that the Covyn shall be traversable, which *Peryam* denyed clearly, and said that he ought to averr the Covyn.

Reason.

Nihil habet.

Reentrie.

12.

Supersedeas. A Man was condemned in an action of Debt, and brought an *Audita querela* upon a release, and had a *supersedeas*. *Peryam*] If the Sherif take him before that he hath notice of the Writ, although it be after the Teste, yet it is well done, but otherwise of an Utlary. But *Fenner and Walmisley* held to the contrary, and *Fenner* said that he had seen a President to the contrary.

13.

Declaration double. AN Action upon the Case was brought against *Mathew* late Under-Sheriff of *Hampshire*, that where an Execution was directed to him, by vertue whereof he had taken goods to the value of the execution, and sold them for less, and that he hath not retorned the Writ; and upon this Declaration the Defendant demurred in law, because it was alleged to be double. But *Fenner* held the contrary, & said, that an Action upon the Case is like to an Action of Covenant, where a man may shew all the covenants broken. *Curia*] If the one matter

matter be depending upon the other, it ſhall not be double, and here all is, for not retourning of the ſame Writ. Wherefore *Fenner* ſaid, that he would not amend his Declaration, let the other Demur if he would, (*ſed quære*) for the Declaration ought to agree with the Writ. *Dependance is not double.*

14.

A Writ of falſe Judgement was brought upon a Judgement given in a Court of the Deane and Chapter of *Weſtminſter*, in an Action upon the caſe brought againſt one as Adminiſtrator; And did not ſhew by whom the Adminiſtration was committed, which he ought to have done by 32 *Hen.* 6. & 35 *Hen.* 6. 50. *a.* and the *Aſſumpſit* was laid to be in conſideration that Aſſets came to the hands of the Defendant, And whether this were a good conſideration, was another doubt, and it was not averred that the Adminiſtrators had goods ſufficient after the Debts and Legacies were paid. And at this day it was held, that when an Action is brought againſt an Adminiſtrator, it need not be ſhewed; but in an Action brought by them clearly, they ought to ſhew it. And for the other matter, whether the Plaintif needed to aver that they had Aſſets beſides the Debts, *&c.* it was ſaid, that this ought to come and be ſhewn on the other part. And for that *Woodwards* caſe in the Commentaries was cited. And the next morning *Puckering* ſhewed, that he had a report of a Judgement given in the Kings Bench, that it is not neceſſary to ſhew that they had Aſſets beſides the Debts and Legacies, *&c.* And therefore he prayed that the Judgement may be affirmed. And ſo it was, for *Rodes* had ſeen the report of *Puckering*, according to his ſaying, and teſtified the ſame, whereby Judgement was here given againſt the Adminiſtrator, *Anderſon* being in the Starchamber. *Adminiſtrators.*

15.

IT was agreed by all the Juſtices, that for a Herriot ſervice, the Lord cannot diſtrein out of his Fee, no more than for a Rent; but he may ſeiſe a Herriot Cuſtom out of his Fee *Herriot.*

16.

A Man was outlawed, and the Sherif retourned the Proclamation (*tali die omnes & ſingulas proclam. fieri feci*) And did not ſhew that ſuch a day he made the firſt, and ſuch a day the ſecond, *&c.* and this was aſſigned for Error, and prayed that the Utlary might be reverſed, and ſo it was. *Vtlary.*

17.

Rent-service. FLeetwood ſhewed that this caſe came in pleading. A man had a Rent ſervice payable at the Feaſt of St. *Michael*, And on *Michaelmas* day he died about ten of the clock in the morning; now he demanded whether his Heir or his Executor ſhall have the Rent? *Anderſon*] Hath he not all the day to pay it? and upon condition to pay ſuch a ſum, he may tender it any time before Sun-ſet. *Feryam*] But if the party accept the payment in the morning, it is good. *Curia*] If it be a caſe in this Court, you ought to demur as your caſe is, and not to be thus Politick.

18.

Abatement. A Writ of Error was brought upon a Judgement in the Kings Bench, and one of the parties died, hanging the Writ; And the Court held this to be an abatement of the Writ, and that he ought to purchaſe a new Writ.

De Term. Mic. Anno Reg. Eliz. xxxx. & xxxxj.

1.

Abatement. Dier 3. & 4. Phil. & Mar. 134. AFormdon was brought againſt *Haſelwood* and *Haſelwood*, and the one took the Tenancy of the one Moity, *Abſq; hoc* that the other had any thing therein, and pleaded in abatement of the Writ, and the other took the Tenancy of the other Moity, and vouched. *Shut.*] Shall I maintain my Writ, or anſwer to the Bar of the other? *Tota Curia*] You muſt needs maintain your Writ. *Anderſon*] Where the pleading is ſuch, as your Writ cannot be good, there it is a ground that you ought to maintain your Writ; but if a *præcipe quod reddat* be brought againſt two, and the one plead Nontenure, and the other accepts the entire Tenancy, *Abſq; hoc, &c.* and doth plead in Bar, there you may anſwer to the Bar, becauſe there peradventure the Writ is good, notwithſtanding; As if a Writ be brought againſt the Feoffor and Feoffee upon condition, or Morgagor and Morgagee; and ſo there is a diverſity.

Præcipe quod reddat.

2. In

2.

IN a *Quare impedit* brought by the Queen againſt the Archbiſhop the diſturber, and the Incumbent, the diſturber pleaded, that long time before he had any thing in the Advowſon, by whoſe Utlary the Queen is intitled, King *Ed.* 4. was ſeiſed of the Honor of *Haſtings*, and granted it to the Lord *Haſtings* in Fee. and further granted *omnia bona & catalla omnium tenentium ejuſdem honoris ſive manerii reſidentium & non reſidentium qui forent utlagati*, &c. and ſo conveyes the Honor by deſcent to the now Lord *Haſtings*, and did not aver that he which was Utlawed, was a Tenant of the Honor. *Curia*] It is not good without doubt, for otherwiſe he is not within compaſs of the Grant, and therefore a day was given, by which, if the Defendant did not ſhew better matter, the Queen ſhould have Judgement.

Vtlary.

Averment.

3.

IN the Kings Bench *Anne Bucher* brought an *Ejectione Firme* againſt *Anncell Samford*, and other Defendants, And upon not guilty pleaded, the Jury found a ſpeciall Verdict, *viz.* that *William Samford* was ſeiſed of the Mannor of *Stone-houſe* in the Pariſh of *S.* whereof the Tenements in demand were parcell, and of divers other Tenements within the ſame Pariſh, and within a place known in the ſame Pariſh, which is neither Town nor Hamlet, called *Ebney*, in which *Samford* had a Tenement, which hath Lands time out of mind perteining thereunto, lying as well in *Ebney* as in *Stone-houſe*, which Tenement is in the Tenure of one *Bucher* by Copy of Court-roll, according to the cuſtom of the Mannor, Afterwards *William Samford* deviſeth to his Brother, after the death of *Bucher*, all that my Tenement with the Appurtenances wherein *Bucher* dwlleth in *Ebney*, Now the queſtion was, whether the Lands in *Stone-houſe* perteining thereunto ſhall paſs or no? And the famous *Cook* argued that it ſhould paſs, for this word Tenement referreth to his dwelling which is in *Ebney*, and not to the place where the Lands lie, And therefore he ſaid that words ought to have relation, *ut ne impediatur ſententia, ſed ut res magis valeat quam pereat*, and he cited 4 *Ed.* 3 in a *Quare impedit quod permittat præſentare ad eccleſiam de Mourton Majorem*, and the Defendant demanded Judgement of the Writ for falſe latin, becauſe of *Majorem*, and yet it was adjudged good, for it ſhall be referred to *eccleſiam*, and he cited 19 *Ed.* 3. & 3 *Ed.* 4. Allſo it paſſeth by this word appurtenances; for there was ſuch a Chambridgſhire caſe here within this Twelve-month, where a man gave inſtructions to another to make his Will in this form, I will that *B.* ſhall have my Houſe, with

Deviſe. Gloceſter. Hil. 30. Eliz. rot. 188.

Quare impedit.

all my Lands thereto apperteining; And the other made it in these words, I devise to *B.* my house, with the Appurtenances; and it was adjudged that the Land should pass by this words Appurtenances. For allthough that in late Books, Lands shall not pass by this word Appurtenances, yet this is good authority to prove that they shall pass, as 7 *Hen.* 5. 41. & *T.* 21 *Ed.* 3. 18. Allso Wills shall be taken by meaning, and here upon this devise 4. l. Rent is reserved, and the antient Rent is but 45. s. and if the Land should be racked, it is all worth but v. l. a year, and becaus they are held in *Capite*, therefore by the Statute we shall have but two parts. And it cannot be intended that it was his meaning to have us pay 4. l. for the Lands in *Ebney*, wich are not worth so much, therefore somtime the valew is considerable in a Will, and cited 4 *Ed.* 6. & 7 *Ed.* 6. and so he thought the Plaintif ought to recover. And at this time the Court seemed to be of the same opinion, for they gave day over to the Defendant, at which day, if nothing were said, Judgement shall be given for the Plaintif.

Valew.

4.

Survivor. *Mic.* 29. & 30 *Eliz. rot.* 2325.

Awdy prayed Judgement in an Action of Trespas by *Hambledon* against *Hambledon*, the case was such. *H.* was seised in Fee, and had issue, three Sonnes, *John*, *William* now Plaintif, and *Richard* now Defendant, And by his last Will devised Lands to *John*, and to the Heirs Males of his body ingendred, and devised other Lands to *William* in like sort, and other Lands to *Richard* in like sort, And that if any of his Sonnes died without issue Male, that then the Survivor shall be each others Heir, Afterwards the eldest died without issue Male, And if *William* shall have all his part alone, or else he and *Richard* between them, was demurred in Law, and day was given over to argue it.

5.

Impounding.

Almisley shewed how an Action was brought by *Berdsley* against *Pilkington*, upon the Statute of 2 & 3 *P.* & *Mary*, for driving a Distres out of the County, And shewed the truth of his case, that the Distres was taken in the Hundred of *Offlay* in *Staffordshire*, and the City of *Lichfield* was sometime within this Hundred, And by Letters Patents of 1 *Mariæ*, the City was made a County of it self, and he which took the Distres impounded them within a pound in the County of the City of *Lichfield*; now whether he hath incurred the penalty of the Statute, or no, was the question? And because the Court had not a Statute Book there, to see the Preamble, therefore

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therefore they would give no resolution. *Anderson*] The meaning of the Statute was, because the Bailif of the Hundred might make deliverance. Allso I think it is within the compass of the Statute, because the City was a County severed before this Statute made. And the Serjeants at the bar said, that the party may drive the Distress as far as he will within the same Hundred, but he ought not to drive it above three miles without the Hundred. *Same Hundred.*

6.

I *John Slywright* exhibited an information upon the Statute, for buying of Titles, against *Page*, and declared how *Joane Wade* demised to *Page* for 60 yeares; the Defendant pleaded not guilty; And now a Jury of *Sussex* appeared at the bar. And upon Evidence it was moved, if a man have a lawfull Title to enter into Lands, but hath not been in Possession, and he entreth and makes a Lease for yeares thereof, if this be within compass of the Statute. *Champerty.* *Pasch. 30. Eliz. rot. 1532.* *Lawfull title.* *Anderson*] It is within the Statute, for the mischief was, that when a man had a Title to Land, he would let it to another, to have maintenance and imbracery, and make contentions, and Suites, for remedy whereof the Statute was made. For if a man have a Title, he may recover according to his Title. *Peryam*] The mischief hath been truly recited, and therfore it is reason to restrain such bargains. But if a man Recover by Formdon or *Cessavit*, and make a Lease, this is not within compass of the Statute, allthough that he hath not been in Possession by a year; and in my opinion the Plaintif need not prove that it is a pretented Right, because the Statute expoundeth what is a pretented Right, *viz.* if he hath not been in possession. And so I have delivered my opinion before this time. *Recovery.* *A pretended Right.* *Anderson*] If a man hath not been in Possession, and cometh to me, and saith, that he will make me a Lease, and demands if I will take it, and I agree thereto, whereby he maketh me this Lease, if I do not know that he hath not been in possession, I am not within the Statute. And then the Defendant shewed that he was brother of the half blood to the Wife of the Lessor, whereby he might take the Lease well enough. For *Fleetwood* cited 6 *Ed.* 3. if one brother maintain the other, this is not within the Statute of Champerty, which case the Court agreed, this is for speciall cause. *vide statut. de articulis super cartas.* *Ignorance.* *Anderson*] One brother may travell for another, and maintain him, but if he take a Lease of him, he is within the Statute of 32. *Hen.* 8. for this is a generall mischief, and the mischief is as great, if the brother take a Lease, as if another take it, *quod Periam concessit* clearly, but because it was the case of the Defendant, the Jury found a speciall Verdict, *viz.* that the Lands were conveyed by the Husband of *Joane Wade*, to the use of himself *Maintenance* *Champerty* *Difference,* *The case.*

 and

and his Wife in Tail-ſpeciall, the Remainder to the Husband in generall-Tail, the Remainder to the Wife in Fee, and after the Husband Enfeoffed diverſe men thereof, and the Feoffees continued in Poſſeſſion diverſe years, After the Husband died, and then the Wife by indenture ſealed and delivered, of the Land, made a Leaſe to *Page* which knew all this matter, from the fift day of *Jennary* laſt paſt, for 60 years, if the Wife ſhould live ſo long, and that the Wife was Siſter to *Page* the Defendant by the Mother, and found the valew of the Land as if it ſhould be ſold, and they prayed the adviſe of the Court, *&c.*

Knowledge.

And the morow after, the like information being brought againſt the woman being Leſſor, the like Evidence was given, and the like caſe found.

7.

Recovery.

Fenner moved this caſe to the Court. An Alien born purchaſeth Lands in Tail, the Remainder to a ſtranger in Fee; The Alien ſuffereth a Common Recovery to his own uſe in Fee, And after an Office is found of all this matter, if the Remainder ſhall be to him which had it before or no was the queſtion. *Anderſon*] I think the Queen ſhall have a good Fee-ſimple, for if there be a good Tenant to the *præcipe*, then is the Remainder gone, and you will not deny but that he is Tenant ſufficient before Office found. *Fenner*] True, Sir, but when the Office is found, by relation thereof the Recovery is avoided. *Anderſon*] Truely the Office hath relation for the Poſſeſſion of the Alien, but it hath no ſuch relation to ſay that the Alien never had it, for then the Queen ſhall not have it; but if the Alien were Tenant ſufficient at the time of the Writ brought againſt him, then the Remainder is utterly gone. And all the Juſtices ſaid that it is a ſtrong caſe that the Queen ſhall have it, and that the Remainder is gone. And *Rodes* cited 27 *Aſſ.* fol. 50.

Tenant ſufficient to the præcipe.

Relation.

8.

Copyhold.

Plympton brought an Action of Treſpaſs againſt *Dobynet*, the Defendant pleaded, that the place in which, *&c.* is Copyhold, and pleaded a Grant to *Southey*, which granted it to him, *&c.* The Plaintif replyed, that long time before the Grant pleaded by the Defendant, *Alice Gooding* was Leſſee for life, *ſecundum conſuetudinem manerii. &c.* and that the Cuſtom is, that the Lord may grant Copies as well in Reverſion as in Poſſeſſion. And that in 5 *Eliz.* the Lord *Morley* being Lord of the Mannor, granted to him a Copy in Remainder before the grant made to *Southey*, which now came in Poſſeſſion, and that he

The Lord Morleys caſe.

he entered, untill, *&c.* The Defendant rejoyned that there is a cuſtom in the Mannor, that the Lord may grant Copies in reverſion, with the agreement and conſent of the Tenant in poſſeſſion; and if any Copies be granted, without conſent of the Tenant in poſſeſſion, that then there is ſuch a cuſtom, that ſuch Grants ſhall be alltogether voyd, *abſq; hoc*, that they are deviſable *modo & forma, &c.* whereupon the Plaintif demurred in Law. *Walmiſley*] This Plea of the Defendant is repugnant; for by theſe words, *If any be granted*, he implyeth, that there is ſuch a cuſtom; and then when he ſaith *abſq; hoc* that there is ſuch a cuſtom, this traverſe is voyd, and the Plaintif ſhall have Judgement, by 9 *H.*6. Allſo he argued that this cuſtom ſhall be voyd, and cited 19 *Aſſ.* the caſe of the command of St *Johns*, and 2 *Hen.*4. & 19 *Eliz.* the *Ejectione firmæ* by *Bill* an Attorney; and he defined uſuage to be, *Conſtitutio ex diverſis actionibus ſæpius iteratis.* *Shuttelworth* argued to the contrary, and cited 37 *Hen.* 6. the caſe of *Common*, and 26 *Ed.*3. *Cuſtom what it is.*

9.

Awdy the Queens Serjeant rehearſed the caſe of *Beverley* in this manner; *Thomas Beverley* brought a *Quare impedit* againſt the Ordinary, and *Gabriell Cornewell* the Incumbent, which was in, of the preſentation of the Queen; and upon pleading, there was a Demurrer entred up, and before that was diſcuſſed, *Beverley* was Outlawed at the ſuit of another, in an Action of Debt; then *Cornwell* reſigned his Benefice, and the Queen preſented him again, whereupon he was inſtituted and inducted; Then *Beverley* brought a Writ of Error in the Kings-bench, and reverſed the Outlary, becauſe that he was named of *Hamby*, where there were two Towns of the ſame name, and neither of them without an addition, and now he brought a *Scire facias* to execute his firſt judgement againſt *Cornwell*, who pleaded all the matter in bar, and it ſeemed to him that the Plaintif ſhall be barred; for by the Outlary of the Plaintif, the preſentation was forfeited to the Queen, allthough that it was but a thing in action, and thereupon he cited 2 *Hen.* 5. where a man had a Patronage with his Wife, and was Outlawed, *&c.* then, if by the reverſall of the Outlary, he ſhall be reſtored to the preſentation; and he ſayd that he ſhall not, for that it was a thing once lawfully executed, and veſted in the Queen, and he cited 4 *Hen.* 7. where a man is attainted by Act of Parliament, *&c.* Allſo the opinion of *Brian* there, is a ſtrong proof of this caſe. And further he ſayd, that he was of counſell with a caſe in 26 *Eliz.* where Debt was brought by *Hanmer* againſt *Luddington*, and the Defendant was condemned, and a *Fieri facias* iſſued to the Sherif, who by virtue thereof ſold a term of *Utlary.* *The Caſe.* *Patronage in right of his wife.* *Reſtitution after a* Scire fac.

of the Defendants, and levyed the money thereupon, and afterward the Defendant brought a Writ of Error, and refuſed the Judgement, the queſtion was if he ſhall be reſtored to his term ; and it was adjudged, that he ſhall not, but onely to the money for which it was ſold, becauſe the ſale was once good, and ſo he thought that the Plaintif ought to be barred. *VValmiſley* to the contrary: For in our caſe, when the Queen preſenteth, ſhe hath gained a Patronage to her ſelf, untill we recover it again, and this is the caſe of *Ratcliffe*, in 35. For ſo long as the Incumbent which is preſented continueth by that Induction in poſſeſſion, ſo long he which preſented him is Patron, *per Collow*, in 20 *Ed.* 4. and by 46 *Edw.* 3. *tit. Incumbent.* & 19 *Ed.* 3. *tit. Quare impedit.* If the King bring a *Quare impedit*, and hath title to recover, yet the other is Patron untill his Clerk be removed, *a fortiore* where the Writ is brought againſt the Incumbent of the King, he is Patron untill he be removed, then if nothing ſhall be forfeit to the Queen, then it is to be conſidered, becauſe the Queen hath preſented the ſame Defendant of new, whether he ſhall be removed or no, and it ſeemeth clearly that he ſhall, becauſe he claimeth under this eſtate, and this is done hanging the Writ; and no act done hanging the Writ ſhall extort the Plaintif from his execution, and ſurely the Writ is hanging untill execution be done; and he cited 31 *Hen.* 6. If one make an Attorney, he ſhall be Attorney untill execution be done; and 21 *Hen.* 7. if the Defendant reſign, and a ſtranger is preſented, hanging the Writ, yet the Plaintif ſhall remove the ſtranger, and 20 *Eliz.* in *Dyer* accordeth with that, notwithſtanding that ſome there held the contrary: And to the like purpoſe is the caſe in 11 *Hen.* 4. of traverſe of an Office. Then for the Outlary that was avoydable by Plea, by the Statute of 2 *Hen.* 5. *per* the Books, in 22 *Hen.* 6. and 38 *Hen.* 6. Then if by the Outlary reverſed he ſhall be reſtored, and it ſeemeth that he ſhall; for a man ſhall ſee a great difference between this caſe and the caſes put: For if a man in an Action deny his Deed, and therefore pay a Fine to the King, if after he reverſe the Judgement, yet he ſhall not be reſtored to the Fine, becauſe it is a by-thing, and a thing collaterall, and therefore he denyed the opinion of *Brian*, in 4 *Hen.* 7. for it cannot be Law: But if a man be indebted to me, and after I am Outlawed, and then the King releaſeth this debt, and then I bring a Writ of Error, and reverſe this Outlary, I ſhall be reſtored to my action again. And here he hath ſhewen to us a peece of cunning; for when he pleads the Outlary in us, he hath pleaded the Record ſpecially, for otherwiſe we would have ſayd, *nul tiel record*, and then it being reverſed it ſhould have been certified for us, as there is a caſe in *Dyer*. Then here, allthough that be in by a new preſentation, yet all the words of our Writ are true in this *Scire facias*; but I grant that Exe-

Patronage.

Poſſeſſion.

Acts done hanging the Writ.

Attorney.

Preſentment. If he come in by title, by mony:

Plea by the Statute.

Collateral thing

Releaſe of the King of the debt of one outlawed.

Speciall pleading.

cutors

cutors ſhall have a *Quare impedit* for a diſturbance done to their Teſtator. *Anderſon*] The caſe in *Dyer* is thus reported, That I when I was the Queens Serjeant, and *Gerrard* now Maſter of the Rolls, then being Attorney of the Queen, were of opinion that the Clerk of another ſhall not be removed, and concerning that matter, I held then, as I doe ſtill, that in ſome caſes the Clerk ſhall not be removed, and in ſome caſes he ſhall; for if he come in under the title of the Plaintif, and ſince the ſame, then he ſhall be removed, but if he come in by title Paramont he ſhall not be removed; and here, for that this is done hanging the Writ, it ſeemeth that he ſhall be removed: For if a man bring a *Pracipe*, and hanging the Writ the Tenant alien, yet the recovery is good againſt him, and ſhall allſo bind every one under him. *Peryam*] That point is clear enough, but the queſtion is if by the Outlary the Plaintif hath forfeited his preſentation to the Queen? For if it be ſo, then this is a new title for the Queen. *Anderſon*] What reaſon is there in that? when it was an apparent practiſe of the Defendant to reſign; for otherwiſe ſhe could not have preſented, the Church being full before. *Peryam*] The practiſe is not good without doubt, but what is the Law? *Anderſon*] The Law is, that the Defendant by his reſignation, ſhall never extort the Plaintif from his execution. *Peryam*] The point is if by the Outlary the Queen have a new title, by reaſon of the Plaintif, and I doubt much thereof, if by the judgement ſhe ſhall have the preſentation. *Anderſon*] I am reſolved that there is not any colour in the caſe, but what ſay you? *Rodes*] Truly I hold that the Plaintif ſhall remove the Clerk. *Windham*] And in my opinion it is clear enough, that by the reverſall of the Outlary the Plaintif ſhall have his preſentation. *Anderſon*] Then let Judgement be entred for the Plaintif. *Peryam*] In the name of God, if you be agreed againſt me.

Executors ſhal have a Quare impedit.

Title paramont.

Tenant in a Præcipe aliens:

Plenarty.

Reverſal.

10.

A Writ of Partition was brought by *Henry Tannworth*, and *Chriſtian Tannworth*, againſt *John Tannworth* their elder brother; for lands in *Hawleſteed*, alias, *Elſted* in *Leiceſter-ſhire*, becauſe that *Halſteed* is parcel of the Soak of *Rothelay*, wherein there is ſuch a cuſtom, that the lands ſhall equally deſcend to all the heirs males, and in giving of evidence, *Walmiſley* ſayd that the members of a Mannor are other Towns in which the Mannor extends, and *Puckering* ſayd, that at this day the Queen may make a Soak: For it is nothing elſe but a Precinct, to which divers Mannors come to doe ſuit; and as a great Leet containing divers other Courts; and the Evi-

Partition.

Members of a Mannor.

Soak quid.

dence was ſtrong for the Tenant; for he ſhewed by plain proof, that this was never parcell of the Soak, allthough that it was within the ancient Demeaſne of *Rothelay*, as it was proved by the Book of *Domeſday*, which was there ſhewen, and a Clerk of the Exchequer read it (for other Clerks could not) and he ſayd, and ſo ſayd the Serjeants; and the Tenant delivered to *Anderſon* and *Peryam* an ancient Book of the time of *Ed.* 2. for their remembrance, wherein, in 4 *Ed.* 2. in a *nuper obiit*, it is ſayd, that if the Lands which have been departible and departed, come into the Lords hands by Eſcheat, they ſhall not be departible in his hands, *vel in manibus alicujus alius perquiſitoris non poſſunt partiri.* And he ſayd that ſuch was the opinion of Sir *Thomas Bromley* the laſt Lord Chancellor upon hearing of the matter there; whereby when the Jury came to give their Verdict the Plaintif was Non-ſuit.

Domeſday.

Partible lands Eſcheat.

II.

Office of the Court.

Paſch. 30 *El.* rot. 421.

Huttelworth ſhewed how *Robert Hughſon* brought an Action of Debt againſt *B.* as Adminiſtrator of *F.* and declared upon a ſimple contract made by the Inteſtate, and the Defendant pleaded *plene adminiſtravit*, and it was found by Verdict againſt him. And now in arreſt of Judgement the Defendant alleged, that the Action is not maintainable againſt him upon a ſimple contract. And *Shuttelworth* thought that now he is paſt that advantage, becauſe he did not ſhew it in pleading, and cited the opinion of *Cotteſmore* in 13 *H.* 6. And whether the Court *ex officio* ought to bar the Plaintif or no was the queſtion. *Rodes*] It appeareth to us judicially that no action will lie upon a ſimple contract againſt Executors or Adminiſtrators, wherefore then ought the Plaintif to have Judgement? *Shuttelworth*] Becauſe by his Plea he took upon him notice of the contract, and by 46 *Ed.* 3. where the Adminiſtrator was privy to the retainer of a ſervant, he was charged by a ſimple contract. *Rodes*] Here he did not take notice, and in 15 *Edw.* 4. The Court *ex officio*, abated the Writ. *Shuttelworth*] This is by *Littleton* onely. *Rodes*] The caſe is ruled, and *Littleton* gave Judgement; ſo is the caſe in 11 *Hen.* 4. where an Action upon the caſe is brought againſt an Inne-keeper, if he be not named *Hoſpitator*, allthough he plead in bar, yet we *ex officio* ought to abate the VVrit. *Peryam*] If he be no Hoſteler, the Action lyeth not againſt him. And if an Action of Debt be brought, and doe not ſhew the place of the Obligation, if the other plead a releaſe, this is good enough. *Shuttelworth*] So is 18 *Edw.* 4. & 6 *Hen.* 7. *Rodes*] If a man bring an Action, and the Defendant plead in bar by Deed, and do not ſhew the Deed, and the other pleads in bar, and doth not except thereunto,

A common Innholder.

A Deed not ſhewed in Court.

to,but they were at Iſſue,this is Error ; for we *ex officio* ought to have adjudged it evill; and ſo is the Book in 22 *Hen.* 6.or 28 *Hen.* 6. and I can ſhew the caſe. Then *Shuttelworth* ſayd privily to his Client, I doubt we ſhall doe no good by our Action. (*Anderſon* being then in the Star-chamber.) After at another day *Anderſon* rehearſed the caſe, and ſayd, it appeareth to us, that Executor or Adminiſtrator cannot be charged upon a ſimple contract, and the Court *ex officio* ought to ſtay the Judgement, and the VVrit at the firſt ought to have been abated, and this is reaſon, and ſo is the Book in 15 *Edw.*4. and then by the aſſent of the other Judges he gave Judgement accordingly.

12.

Fine.
Hil.29 El. rot. 824.

10 Co. 50 a.
2 Leon. 36.
Cro. Eliz: 122.
Hob. 333.

ROBert *Johnſon* is Plaintif againſt *Jonathan Carlile* in an *Ejectione firme* ; and upon not guilty pleaded the Jury found a ſpeciall Verdict, that *William Grant* was ſeiſed in fee of the Lands now in queſtion being held in Socage, and deviſed them to his Wife for term of her life ; and when *John* his ſonne came to the age of 25 years, then he ſhonld have thoſe Lands to him and to his heirs of his body ingendred, and dyed ; afterwards the ſayd *John* before that he came to the age of 25 years levyed a Fine thereof in fee, and after came to 25 years, and had iſſue a Daughter, and dyed, and after the Wife dyed, then the Daughter entered, and made a Leaſe to the Plaintif; the queſtion was no more, but whether this Fine levyed by the Father before any thing was in him ; ſhall be a bar to the Daughter. *Rodes*] The queſtion is if the Daughter may ſay that her Father had nothing in the Land at the time of the Fine levyed ? and ſo by this means Fines ſhall be of ſmall force. *Windham* and *Peryam*] We have adjudged it lately in *Zouches* caſe, that the Iſſue ſhall not have this averment. *Shuttelworth* for the Plaintif] If it were in Pleading, I grant it well, but here it is found by Verdict. *Curia*] This will not help you ; for by the Fine the Right is extinct. *Windham*] When my Lord *Anderſon* cometh, you ſhall have a ſhort rule in the caſe. *Shuttelworth*] Too ſhort, I doubt, for us. After at another day *Shuttelworth* moved the caſe again. *Anderſon*] May he which levyed this Fine avoyd it by this way? *Shuttelworth*]No Sir. *Anderſon*] How then can he which is privy avoyd it? *Shuttelworth*] By Plea he cannot. *Anderſon*] The Verdict will not amend the matter. *Ferner*] If I make a Feoffment upon condition, and after levy a Fine of the ſame land to a ſtranger, and after I re-enter for the condition broken, the ſtranger ſhall not have the land. *Curia*] VVe have given Judgement clearly to the contrary in the caſe of *Zouch*. And your opinion is no authority.

Parties and privies ſhall have no averment.

Feoffment upon condition.

13.

Dower. Trin. 30. Eliz. rot. 156.

A Writ of Dower was brought by *John Hunt* and *Ioan* his Wife, late the Wife of *Auſtin*, for the third part of Lands in *Wolwich*; the Defendant pleaded that the Lands are Gavelkind, And that the Cuſtom of Gavelkind within the County of *Kent* is, that the Wife ſhall have the Moity during her Widowhood, according to the Cuſtom, and not any third part according to the Common Law; upon which Plea the Defendant demurred in Law; And one queſtion was, whether this Preſcription in the Negative be good with the Affirmative; And the other doubt was, if the Wife may wave her Dower by the Cuſtom, and take it according to the Common Law. And the Juſtices held the Preſcription good enough, being in the Negative with the Affirmative. *Windham*] This Cuſtom ſhall bind the Heir and his Inheritance, and by the ſame reaſon it ſhall bind the Wife and her Dower; which *Peryam* granted expreſly. *Rodes* was abſent, and *Anderſon* ſpake not to that ſecond point. But all the Court agreed clearly that as this Cuſtom is alleged, ſhe ſhall be barred of her Dower. And ſo they commanded to enter Judgement accordingly; but if the pleading had been in the Affirmative onely without the Negative, then the ſecond point had come in queſtion.

Negative preſcription.

Inheritance.

14.

Extent.

Refuſall.

Diſceit.

W *Almiſley* prayed the opinion of the Court in this caſe. The Sherif extendeth Lands upon a Statute Staple, and whether the Conuſee ſhall be ſaid to be in Poſſeſſion thereof, before they be delivered to him or no? *Anderſon*] Allthough that they be extended, yet the Conuſee may refuſe to receive them. *Walmiſley*] True Sir. *Anderſon*] Then hath he nothing in them, before he have received them, for he may pray, that the Lands may be delivered to the Praiſors, according to the Statute of *Acton Burnell*. *Windham*] Your meaning is to know, if the Rent incurres when the Land is in the Sherifs hands, if you ſhall have it? *Walmiſley*] True Sir, that is our very caſe. *Anderſon*] Then this is the matter, whether you ſhall have the Rent, or the Conuſor, or the Queen, but how can you claim it? *Windham*] The Lands are in the Queens hands. *Peryam*] The Writ is, *Cape in manum noſtram*. *Rodes*] This is like to the caſe of diſceit, where he ſhall not have the mean iſſues. So as it ſeemed to them, the Conuſee ſhall not have it, but they did not ſay expreſly who ſhould have it.

15. Treſpaſs

15.

TRespas *quare clauſum fregit*, was brought againſt two, the one appeared, and the other was outlawed, and the Plaintif declared againſt the one onely, who by Verdict was found guilty, and now *Walmiſley* ſpake in arreſt of Judgement, that he ſhould have declared againſt them both, or againſt the one *ſimul cum, &c.* But the Court thought that this was helped by the Statute of Jeofailes, but at this time they were not reſolved. *Simul cum* Dyer 239.

16.

A Speciall Verdict was found, that a Woman ſole was ſeiſed of certain Lands held in Socage, and by her laſt Will deviſed them to *I. S.* in Fee, and after ſhe did take the deviſee to Husband, and during the Coverture ſhe Countermanded her Will, ſaying that her Husband ſhould not have the Land, nor any other advantage by her Will, and then died. Now whether this be a ſufficient Countermand, ſo that the Husband ſhall not have the Land, was the queſtion. *Shuttleworth*] For as much as ſhe was Covert-Baron at the time of her death, therefore the Will was void, for a Feme-Covert cannot make a Will, and a Will hath no perfection, untill after the death of the Deviſor. *Gawdy*] In Wills, the time of the making is as well to be reſpected, as the death of the Deviſor; And then ſhe being ſole at the time of the making, allthough that afterwards ſhe took a Husband, yet this is no Countermand, and ſo is *Bret.* and *Rigdens* caſe in the Commentaries. *Anderſon*] If a man make his Will, and then become *non compos mentis*, yet the Will is good, for it is Common that a man a little before his death, hath no good memory. *Shuttleworth*] I do not agree the Law to be ſo, and ſo *Rodes* ſeemed to agree, but *Anderſon* affirmed as before. *Windam*] I doe not doubt but ſuch a Will ſhall be good. *Rodes*] If a man make his Will, and after do become *non compos mentis*, and then live three or four years after, it is no reaſon that ſuch a Will ſhall be good, and he cited 3 *Edw.* 3. *itin. Northt.* for this caſe. *Gawdy*] If the Proviſo in the Statute of Wills had not been, then every Will made by a Feme-Covert ſhould have been good. *Tota Curia*] That is nothing ſo, for allthough the Proviſo had not been, yet the Statute ſhould have had a reaſonable conſtruction. But for the principall caſe, the Court was not yet reſolved. After at another day, *Gawdy* moved the caſe again, and held ſtrongly, that by taking of a Husband, this is not Countermanded, and cited 2 *R.* 2. and then during the Coverture, ſhe hath ſubmitted her Will to her Husband; For by 3 *Ed.* 3. *itin. Roteland* ſhe cannot

Diſability of the Deviſor at the time of his death.

Taking a Husband is no Countermand of the Wife.

Not of ſound mind.

Long life maketh difference.

Reaſonable conſtruction.

cannot deviſe to her Husband, whereby he concluded that the VVill is good. *Shuttleworth* to the contrary, becauſe ſhe hath no ability at the time when it ſhould take perfection, and every Will ought to have three things, Inception, Progreſſion, and Conſummation. And he cited *Bret.* and *Rigdens* caſe. *Anderſon*] I am of my firſt opinion that this VVill is not good, for I think this Countermand by the Wife is ſufficient, and if *non compos mentis* ſay that he doth revoke his Will, this is a ſufficient Countermand. And whereas it hath been ſaid, that a Feme-Covert hath no VVill; Sir that is not ſo, for ſhe hath a Will in many caſes, as if ſhe be Executrix ſhe may make a gift, *&c.* So if I be bound to do ſuch an Act, if ſuch a Feme-Covert will conſent, in this caſe if the Husband onely conſent, it is not ſufficient, but the Wife ought to aſſent allſo. And if this Will ſhall be good, then this miſchief will enſue, that after a Will is once made, the partie ſhall have no power to controll it, therefore I think the Will is not good. *Wyndham*] I am of the ſame opinion. For a Will is not perfect untill after the death of the Deviſor, and when ſhe is diſabled at the time of her death, the Law ſaith, that ſuch a Will is void. But I think that a Feme-Covert cannot Countermand her Will, for the ſame reaſon which doth diſable her to make a Will, doth allſo diſable her to Countermand that which is made before; for by 3 *Edw.* 3. which was cited before, ſhe cannot deviſe to her Husband, and by the ſame reaſon ſhe cannot Countermand that which is deviſed to her Husband; but becauſe the Wife was not a perſon able at the time of the Conſummation thereof, therefore it is not good. *Peryam* to the ſame intent. Firſt the Mariage is not any Countermand, and for the caſe in 2 *R.* 2 I think it good Law. And I have allwaies taken this diverſity, that if a woman grant the Reverſion after Tenant for years, and before Attornment had ſhe take a Husband, that this is a Countermand, but if that it be a Reverſion after Tenant for life, then it is no Countermand, For in the firſt caſe his Title of Tenant by the Curteſie begun by the intermariage, Allthough that it was not conſummate before iſſue had; And it ſeemeth a clear caſe that a Feme-Covert cannot Countermand a Will, for ſhe cannot make a Will. And whereas it hath been ſaid by my Lord, that a woman hath a will, true it is; but that is either by cuſtom, or by reaſon of ſome by-matter, as in the caſes put. But VVills ought to take effect at the time of the death, and if then ſhe be diſabled, it is not good; for it is not conſummate before; as if there be Husband and VVife, and the Husband be ſeiſed of Lands in Fee, and levy a Fine thereof, and then dye, and after the levying of the Fine five yeares paſs, yet ſhe ſhall not be Barred; but if after the death of the Husband five yeares paſs, ſhe is barred by a Fine, becauſe her title was not conmſumate untill after the death of the Husband, whereby *&c.*

Countermand by one not of ſound mind.

Wills of feme covert

Controlement.

No countermand

Conſummation.

Mariage no countermand.

Reverſion.

Will by cuſtom, or by ſome by-matter.

Rodes

Rodes to the ſame intent, for if I deviſe the Mannor of *Dale* as it is in the Com. for &c. and then have nothing in it, but afterwards purchaſe it, now it ſhall paſs, which proveth that the perfection of a Will is at the time of the death, and in 39 *H.* 6. a man deviſed lands, and before his death was diſſeiſed, nothing paſſed by the Will, becauſe it was no Will, untill death; and here in our caſe becauſe ſhe was diſabled at the time of her death, it is void. *Anderſon* Then let judgement be entred accordingly.

Perfection.

Diſſeiſin after Will.

17.

A Proclamation was directed to the Sherif of *Cheſhire* againſt *John Hockenhall*, and the Writ was retorned, *Tale die ad comitat. meum tent in le Shirehall &c. proclamationem feci, ac eodem die ad generalem Seſſionem &c. proclamationem feci &c.* And now this matter was pleaded in avoidance of the Utlary to reverſe it, becauſe thoſe proclamations were made one day, whereas the Writ was (*tribus ſeperalibus diebus &c.* And the Sherif was amerced to forty ſhillings for his evill retorn. And at another day he was amerced to other forty ſhillings becauſe he had retorned divers Writs in Secretary hand, And commandment was then given to the *Cuſtos brevium*, to receive no Writs retorned in Secretary hand, for the Court ſaid that writing in Secretary hand would be ſo worn in a dozen yeares that no man can read it.

Proclamation. *Dyer fol. 206.*

Secretary hand.

18.

Hooker brought debt upon an Obligation againſt *Gomerſale* and his Wife Executrix of the laſt will of *Henry Gooderd nuper dict. Hen. Gooderd de London Tayler*, And they pleaded in bar a recoverie had againſt them in the Kings bench as Executor *teſtamenti H. G. nuper dicti H. G de Lond.* Barber Chirurgeon, whereupon the Plaintif demurred, And the Defendant did not aver that the ſaid *G.* Tayler & *G.* Barber Chirurgeon was allone perſon, and they alſo omitted this word *prædictum*, And whether this were good or no was the doubt, And it ſeemed to the Juſtices that it was not good, although it was alleged that it ſhall be intended all one perſon, and then if a plea in bar be good to common intent, it is good enough. And therupon *John Paſtons* caſe was cited in 21 *H.* 7. Where it was *Weſtmonaſterium*, & doth not ſay *prædictum*, yet it ſhall be intended the ſame *V Weſtm.* mentioned before. Whereunto the Court anſwered, that here by common intent he ſhall not be intended the ſame perſon, but rather to the contrary, For common intent is that which ſhall be intended more ſtrong than any other, and not that which reſteth indifferent, As if a man plead

Common intendment. *Trin. 30. Eliz. Rot. 2403.*

Common intent what it is.

plead a Feoffment in fee, it ſhall be intended that the Feoffer was of full age, but here common intent is that he was another perſon, becauſe Barber Chirurgeon, and Tayler, are divers functions by common intent, And as to the caſe put, by common intent it ſhall be intended the ſame *Weſtm.* becauſe the place is ſo notorious, that common intent will nor intend any other. But *Peryam* would not grant that caſe of 21 *H.*7.

At another day *Gawdy* ſaid that they have a Preſident in 16. *Eliz.* where an action was brought here againſt the Adminiſtrator of *Francis Fitzherbert* Mercer, And they pleaded likewiſe a Recovery in the Kings bench againſt them as Adminiſtrator of *F. F.* Grocer, and allowed for good, and in 10 *H.* 7. waſt is brought and doth not ſay, *prædict.* and yet good *Peryam*] For the caſes in 10. *H.*7. & 21 *H.* 7. It was all in one Plea, but it is not ſo here. And for his Preſident *Anderſon* and *Peryam* ſaid that they would not regard it, if it do not appear that Exception was taken thereunto if the Preſidents be ſhewen for matter, but if they be ſhewen for form then otherwiſe it is. *Anderſon*]If *I. S.* bring a *Præcipe* againſt me, and I vouch *I. S.* it ſhall not be intended the ſame perſon, if he do not ſay expreſly that he is the ſame perſon, therefore a *Fortiori* here it ſhall not be intended the ſame perſon.

Matter Fown] in Preſidents. Voucher.

Afterwards the next Term *Shuttleworth* argued again that it ſhall be intended the ſame perſon, but all the Court was againſt him, and ſo they gave judgement for the Plaintif.

19

A thing in action releaſed.

FEnner ſhewed how *Bartholmew Brooksbie* hath brought a *Quare impedit*, and declared how *A.* was ſeiſed of the advowſon in fee, and graunted to him and another the next avoidance, and after the church became void, and the other releaſed to him all his right *&c.* and the Defendant diſturbed him. And after they pleaded to iſſue which was fonud with the Plaintif, and this matter alleged in arreſt of judgement, that the Releaſe was void, and then he hath no cauſe of action, for when the Church became void, then it was a thing in action or actionary, and therefore could not be granted over by 28 *H.* 8. and by the ſame reaſon it cannot be releaſed, as 1 and 2 *P.* and *M.* and 2 and 3 *P.* and *M.* in *Dyer*. *Anderſon*] If it be an intereſt it ſhall ſurvive, and by the ſame reaſon it may be releaſed, And it ſhall goe to his Executors, wherefore then may it not be releaſed? *Et adjornatur.*

Intereſt ſhall ſurvive.

De

De Term. Mich. Anno xxxix. & *xl.* Eliz. *Reg.*

1.

Tisdale, one of the Attorneyes of the Common pleas, brought an Action upon the Statute of Maintainance against *John at Tree* in *Chancery* lane, for Maintainance in a Spirituall Court; and by all the Court, an Action is not Maintainable for Maintainance in an inferiour Court; for this word, *alibi*, being in the Statute, was expounded to be meant of the Kings Court onely, and in the argument of the same case, *Drew* remembred the Court of a Judgement given there in the like case for one *Constantine* of *Wiltshire*. *Maintainance.*

2.

BEtween *Brown* and *Lother* an Action was brought in the Spiritual Court, for these words, *Thou art a forsworn Knave, for thou madest a false account when thou wert Churchwarden*, and thereupon the Defendant brought a Prohibition, supposing the discussing of Perjury to belong to the Temporall Court, and upon the opening of the matter to the Court, the Plaintif had a consultation, because the Perjury was supposed to be committed about the execution of his Office of Churchwarden, which doth belong to the Spirituall jurisdiction: But otherwise it had been if the Perjury had been supposed to have been committed concerning a Feoffment or other Temporall act, *per Walmisley & Owen*. *Consultation.*

3.

B*Roughton* against *Flood*, the originall Writ was returned by *Needham*, Esquire, Sherif, and his Christian name left out. *Williams* moved the Court to have the Christian name of the Sherif put into the Writ, but the Court denyed it, because the Record was made up, and likewise by this means they should make an Outlary good, which was now erroneous. *Amendment*

4.

Venue. IN an Advowry the Defendant ſaith, that *locus in quo, &c.* is parcell of the Manner of *Dale*, and avows for ſuit of Court, the Plaintif by replication ſaith, that *locus in quo, &c.* is parcell of the Mannor of *Sale*, and maketh to himſelf a title, *abſq; hoc* that it is parcell of the Mannor of *Dale*, and the *Venire facias* was of *Dale* onely, and upon motion all the Court adjudged that it ought to have been of both Mannors, and made a rule for ſtay of Judgement after Verdict. This was the caſe of *Atwood* of the Middle-Temple.

5.

Prohibition. IT was ſayd by *Anderſon* and *Owen*, that a Prohibition will not lye after a ſentence in the Spirituall Court, and that if the Libell be for ſuch a matter as may be determined in the Spirituall Court, no Prohibition will lye, unleſs ſome Plea be pleaded by the Defendant in that Court, which the Judge will not allow: For if a Suit be in the Court of Admiralty upon a contract made upon the Sea, and the Defendant pleaded a releaſe, or a gift, after the coming to Land, that Court may enquire and try this Iſſue; the like for Tythes, 2 *Rich.* 3.

6.

Common. IT was ſayd by *Drew* in the Argument of the caſe between *Rotheram* and *Green*, that if a Commoner take a Leaſe of one Acre, out of which his Common is iſſuing, that his whole Common is ſuſpended; allſo where a Leaſe for years is, rendring Rent, and for default of payment a re-entry, if the Leſſor grant the reverſion of one Acre, the whole condition is gone: Alſo that an entry by the Leſſor into any parcel, ſuſpends the whole rent during his occupation, and *Anderſon* ſayd, that there is no Common by common right, but Common appendant.

Rent.

Condition.

7.

Reſtitution. Trin. 39 Eliz. rot. 1803. A *Dams* brought an Action of Debt upon an Obligation againſt *Oglethorp*, the Defendant pleaded that after the making of the Obligation, the Plaintif was attainted of Treaſon for Coyning, and pleads the Attainder at length; the Plaintif confeſſeth the Attainder, and ſaith, that afterwards the Queen by Letters Patents did pardon him, and did reſtore unto him *omnia bona & cattella ſua*, and

and thereupon the Defendant did demur in Law, the queſtion was, whether Debts by ſpecialty be included in thoſe words.

8.

Aſſets.

Eveling againſt *Leveſon* Executor of the Teſtament of *Walton*, in effect the caſe was this; The Queen was indebted to *Walton* in a hundred pound for Muskets and Callivers delivered into the Tower, for which money *Walton* took a Debenter from the Queen in the name of a ſtranger, and afterwards dyed, and made *Leveſon* Executor, who procured the ſtranger to releaſe and ſurrender the former Debenter to the Queen, and took a new Debenter for the ſame hundred pound to himſelf, this was adjudged no Aſſets, nor *devaſtavit* in the hands of the Executor *Leveſon* upon a ſpeciall Verdict, but otherwiſe it ſhould have been if the firſt Debenter had been taken in *Waltons* own name, for then it had been a *devaſtavit* by the Executor.

9.

Aſſets de judgement. Trin. 39 Eliz. rot. 1345.

Aeon Plaintif againſt *Selling* in an *Ejectione firme*, the originall bare *teſte* 13 *Aprilis An.* 39. and the Plaintif declared upon a Leaſe made to him 22 *Apr. An.* 39. ſo that it appeared to the Court, that the Plaintif brought his Action before he had an intereſt in the Land, and by all the Court a Rule was given for ſtay of Judgement after a Verdict; but afterwards the Plaintif came, and ſhewed that after Improlance he filed a new originall.

10.

Scandalum magnatum.

Henry Earl of *Lincoln* brought a *Scandalum magnatum* againſt one *Michelborn* for theſe words, *viz. The Earl of* Lincolns *men by his commandement did take the Goodt of one* Hoskins *by a forged Warrant*, &c. And the Earl recovered great damages by Verdict, and now it was ſpoken in arreſt of Judgement, that the words were not ſufficient to maintain the Action, becauſe it was not averred that the Earl knew the Warrant to be forged, and of the ſame mind was the Court at this time.

11. *Willoughby*

4.

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11.

Debt. WIlloughby brought an Action of Debt againſt *Milward*, and declared that the Defendant bought Timber of him for ten pound, *ſolvend. modo & forma ſequenti, viz.* five pound *ad feſtum Paſch. proxime ſequentem*, and ſaith nothing when the other five pound ſhould be payed, and the Plaintif recovered the whole ten pound by Verdict; and now it was ſpoken in arreſt of Judgement for the cauſe aforeſaid, but yet by all the Court it was good enough; for the Law intendeth the other part of the money to be due preſently, if no certain day of payment bee alleged.

12.

Debt. Mich. 36 & 37 *El. rot.* 1028. *or* 1021. KItchin brought an Action of Debt againſt *Dixſon*, Executor of *Craven*, the Defendant pleaded (*ne unques Executor.*) and the Jury found a ſpeciall Verdict, *viz.* That *Craven* in his life time made a Deed of Gift of all his Goods to *Dixſon*, and they found likewiſe that this Deed was to defraud Creditors, againſt the form of the Statute, and that the Defendant by colour of this Deed did take the Goods after the death of *Craven*, and if this Deed vvas good, then they found for the Defendant, if not, then they found the Defendant was Executor of his own wrong, and ſo for the Plaintif, and by all the Court Judgement was given for the Plaintif.

13.

Rent charge IT was ſayd by *Drew* (*arguendo*) That if the Grantee of a Rent charge releaſe parcell of the Rent to the Grantor or his heires, the reſidue may be apportioned, and the Land ſhall remain chargeable ſtill for that reſidue, but if he releaſe in one Acre parcell of the Land charged, then all the Rent is gone.

14.

Proviſo. IT was ſaid by *Glanvile* in the argument of the caſe between *Cromwell* and *Andrews*, that a Proviſo in a conveiance to be performed on the part of the Leſſee, implies a re-entry, allthough there be no ſpeciall words of re-entry, but otherwiſe it is when it ariſeth on the part of the Leſſor, and Vouched *Bendlowes* caſe, where there was a Covenant going between the *Habendum* and Proviſo. But where the Proviſo ſtandeth ſubſtantively, as where I grant a Rent charge, Proviſo

so that he shall not charge my person, this is no Condition but a Qualification. Allso where a Feoffment is made upon Condition to grant me a Rent Charge payable at *Easter* and *Christmas*, if the grant be not made before the first Feast which shall next happen, the Condition is broken, and he put a difference where the Condition must be performed by none but himself, and where it may as well be performed by his Executors, as himself. And *Drew* said then, that if there be a Feoffment upon Condition to Re-enfeoff the Feoffer, there ought the Feoffor to make a request, otherwise if it be to enfeoff another. *Condition.*

15.

Common. *Hil.* 39. *Eliz. rot.* 1753.

Smith against *Bonsall*, in effect the case was such; In an Action of Trespass the Defendant pleaded his Freehold, and the Plaintif replyed that *A.* was seised of a Yard-land, to which he had Common of Pasture for all maner of Beasts Levant and Couchant upon the same Yard-land, and of the Moity thereof did enfeoff the Plaintif; the question was, whether this Common may be apportioned, or else it be extinct alltogether. In the argument whereof *Drew* said, that Common *sans* number cannot be granted over, because if it should be granted to a rich man, he may surcharge the Common then, and leave none for the rest of the Commoners, so of *estovers* uncertain, for so the Grantee may burn all the Wood, (*quod Walmisley concessit*) and he vouched 17 *Eliz.*. in *Dyer*, that a Commoner may purchase parcell of the Land out of which his Common is issuing, after that it be improved by the Lord, and not extinguish his Common thereby. And he said, that if parcell of the Common be inclosed, a Commoner ought to make but one gap to put in Cattell; but *Anderson* said, that he may make as many gapes as he will. And it was said by *Anderson* and *Beamont*, that Common appendant cannot be for all manner of Cattell, but onely for such Cattell as compass the Land, and that such Common may be apportioned into twenty parts, as any Common certain may be. *Walmisley & Owen*] If my Land to which I claim Common belonging, can yield me stover to find a hundred Cattell in Winter, then shall I have Common in Summer for a hundred Cattell, in the Land out of which I claim Common, and so for more or fewer proportionably, which they did expound to be the meaning of *pertinen. levan.* and *cuban.* *Walmisley*] If I grant away the moity of my Mannor, we shall both keep Courts, so if I be disseised of a Moity, or that the Moity be in Execution by *elegit*, and we shall both have Common, and in apportionment of Common respect ought allwaies to be had to the quality of the Land unto wsiich it is alloted. And a Copyholder may prescribe

Purchase, *Inclosure.* *Appendant may be apportioned.* *Append. quid.* *Moity of a Mannor.* *Copiholder.*

ſcribe for Common in the Lords Land within the ſame Mannor by *uſitatum fuit*, but, if he claim any other Common, he muſt lay the preſcription in the Lord.

De Term. Hill. An. Reg. Eliz. *xliii.*

1.

Appearance. *Walter Aſcough* priſoner in the Fleet, was brought to the Common place bar by *habeas corpus*, to the intent to have him appear to an Originall in debt brought againſt him; And being demanded by *Goldesburg Clark*, whether he were the ſame party againſt whom the Originall was brought, confeſſed it, but denied to appear to the Action: *Browker* Prothonotary ſaid, the Court ought to record his appearance; confeſſing himſelf to be the ſame perſon; but the whole Court ſaid this was no appearance, whereby he was remanded to the Fleet; And *Tamworth* the Plaintif proceeded to the outlary againſt him.

2.

Frandulent deeds. Trin. xxxviii. Eli. PRice brought an Action of Trover againſt Sir *Walter Sands*; And this was for finding of Corn. And the firſt point of the caſe was, That a man had a Leaſe in Reverſion, and granted it to another by fraud, and his Grantee granted that over to Sir *Walter Sands*, *bona fide*. And if this Grant over *bona fide* being derived out of a Fraudulent Eſtate ſhall be void, *per* the Statute of 27 *Eliz.* or not, was the queſtion. *Harris* Serjeant] It ſeemeth the Grant to Sir *Walter Sands* to be good; And not within the Statute of 27 *Eliz.* For 33 *Hen.* 6. 28. If a man make a Feoffment in Fee by Colluſion, to the intent to defraud the Lord of the Wardſhip; And after this Feoffee by Colluſion make a Feoffment over, *bona fide*, Now the Lord is without remedy, for the Colluſion is gone. And in this caſe there is an ignorance in Sir *Walter Sands*, the which is not willfull, and for that it is not puniſhable: But if the other had taken the profits, ſo that the purchaſer might have notice, there it ſhould be otherwiſe. The 2 cauſe was, *non conſtat* whether the Grant were before the Statute of 27 *Eliz.* or not. For if it were before, then the party ſhall not anſwer the mean profits. Alſo a third matter is, ten yeares of the Term was granted

Notice.

granted for money; But when he granted the Reſidue of the Term and no Conſideration expreſſed, then there ſhall be no conſideration intended. And if there were no Conſideration given, he is not holpen by the Statute: For that helpeth a Frandulent Conveyance againſt purchaſers for Conſideration given or paid, *Et non conſtat* that any thing was paid by the Plaintif. Allſo it appeareth that Sir *Walter Sands* was in poſſeſſion at the making of the Statute. Allſo here the party is charged with a ſpeciall fraud; And the other ſaith, that it was made *bona fide*. And this is a good courſe of pleading without any Traverſe, *per* 4 *Ed.* 4. 24. *Conſideration expreſſed.*

3.

Hugh Hall brought an Action upon his caſe for words, and declared, that where he himſelf was robbed of divers parcels of Cloth, *per quendam ignotum*; and made his integrity and indeavour to apprehend the ſaid thief, *prædictus tamen defendens præmiſſorum non ignarus dixit de præfato Hugone, viz. Hugh Hall* hath received three parcells of his Cloth again of the thief; And if I receive any hurt henceforth, I will charge him with it. And by Judgement of the Court the words are not actionable. *Slander.*

4.

THe Lady *Willoughby* Wife to the late Sir *Francis Willoughby*, ſued in the Chancery as Adminiſtratrix of her ſaid Husband, againſt *Percivall Willoughby*, which had maried one of the Daughters of the ſaid Sir *Francis*; And the Defendant pleaded, that before any Adminiſtration commited to the ſaid Plaintif, he himſelf put in a Caveat in the Spirituall Court, hanging which Caveat ſhe hath attained theſe Letters of Adminiſtration, whereby the Defendant hath appealed, hte which appeal is not yet determined, for which he demanded Judgement if hanging this appeal the ſaid Plaintif ſhall be received to ſue in this Court as Adminiſtratrix. And it ſeemed to *Egerton* then Lord Keeper of the great Seal, that the Defendants plea is good to ſtay the ſuit untill the appeal be determined; But not to be diſmiſſed out of the Court, no more than an excommunication. And he ſaid there is difference between an appleal in Spirituall Law, and a Writ of Error in our Law: For by the purchaſing of a Writ of Error the Judgement is not impeached untill the Record be rehearſed; But the very bringing of an appeal is a ſuſpenſion of the firſt Judgement in the Spirituall Court for the principall matter, but not for the coſts, and for to prove that he cited 2 *R.* 2. *Quare impedit* 143. *& vide* 27 *H.* 6. *Gaud.* 118. *&* 2 *M.* 105. *&* *Dyer* 7 *Eliz.* 240. *Caveat.* *Appeal.* *Appeal, Error. Difference.*

5. In

5.

Execution upon an extent of a Remainder.
Richard Bull Conusee.
John James Conusor.

IN the Chauncery a speciall Verdict was retorned upon an extent, And the case was this; that there was Tenant for life, the Remainder in Tail, And the Tenant in Remainder in Tail made a Statute Staple, and after granted his Remainder. And after the Tenant for life died, and the Grantee of the Remainder entered; And whether Execution shall be sued of this land upon the said Statute, insomuch that the said land was never in Demeasne in the hands of the Conusor, and so not extendable in his hands, was the question. And Sr. *Thomas Egerton* Lord Keeper of the great seal said, that before that time there had been a difference taken between a Remainder and a Reversion depending upon an estate for life: For to a Remainder are no services due nor incident, and for that it is termed Seck; But a Reversion hath services incident, and those may be extended, and by consequence the Reversion when it commeth in possession. But it seemed unto him that all was one, for one may charge a Remainder when it happeneth, aswell as a Reversion; and a Statute is in the nature of a charge. *Cook* the Queenes Attourney said there was no question in the Case; for albeit there wss some scruple made in 33 *H.8. B.* 227. yet the Case is without question: for if he in the Remainder make a lease for yeares, to commence at a day to come; Yet if he grant over his Remainder, the Grantee shall hold that charged with his lease; And every Statute is a charge Executory. By which the said Lord Keeper awarded that there should be a liberate made to the Conusee, upon the retorn above.

6.

Debt by a Successor against an Executor after assignment.

Overton brought an action of Debt against *Sydall*. And the case was, that Prebendary made a lease for yeares rendring rent, and the Lessee died, and the Executors of the Lessee assigned over the Term, and the Successor of the Prebend brought an action of Debt against the Executors for rent due after that they had assigned the estate over, and the opinion of three Justices was that the action would not lye. But *Popham* the chief Justice held the contrary: For the Successor is privie to the Contract of the predecessor; And so the Executor to the contract of the Testator.

Trin. 39. Eliz.
The name of a Corporation mistaken in a lease.

7.

Herborn against *Lewis*, The case was that the Hospitall of *Donington* was founded by the name of *Minister Dei pauperis domus de Donington*; And they made a lease in English by these words, Minister

ſter of the Almes-houſe of God of *Donington beſides Newbery*. And whether there be ſuch variance between the name of the Foundation, and this name by which the leaſe is made, to make the leaſe void, or not, is the queſtion.

Cook Attourney generall ſeemeth that the miſnomer in this caſe makes the leaſe void, for the place of the Foundation is miſnamed, and the place is the moſt materiall thing in the Foundation that may be, and for that if that be miſtaken all is void. And yet he agreed that ſmall variances in ſuch Corporations ſhall not hurt. For Almes-houſe and poor-houſe doth not make any materiall variance, for they are all one in ſubſtance. But it may be that this addition *de juxta Newbery* is of ſubſtance, For there may be two *Doningtons*, *viz.* the one by himſelf, and the other *juxta Newbery*, without averment that it is not another; alſo in the Foundation this word *Dei* hath relation to *Miniſter*, and *pauperis* ſhall go to *domus*, and that appeareth plainly by the Kings lieence of creation, and then the Foundation that explaineth it, and the ordinances alſo, and if the Corporation be not according to the licence, then it is void, alſo it cannot be intended that this word (*Miniſter*) ſhall be referred to *domus*, for the words which give them auctority to elect one that he may be Preſident above the others, and he may not precede the others, if he ſhall be a ſervant. And now to prove that a materiall difference, in 17 *E.* 3. *Friars Carmelites* would have purchaſed land, & for that they had no place of Foundation they might not. And alſo the Dean and Chapiter of *Cheſter* made a leaſe, and this word (*Ceſtriæ*) was omitted, and for that it was adjudged void, and ſo here. *Atkinſon* all *contr.* For here there is no miſnomer of the Corporation, but an interpoſition of words one for another; And they ought to be reaſonably conſtrued, and howbeit they are placed one before another, yet they may be conſtrued according to the Foundation, having a favourable conſtruction, the which ought to be in every grant.

Small variances.

Gaudie It ſeemeth that the leaſe is good, for there is no materiall variance, for variance in letter and not in ſubſtance ſhall not hurt, and here in ſubſtance they agree, as if one ſay that one is Bayly of *I. S.* of the Hundred of *D.* It may be properly ſaid that he is Bayly of *I. S.* So here if he be Miniſter *pauperis Dei de Donington*, he is the Miniſter of God. For if the houſe be the houſe of God, and he the Miniſter of that, then he is the Miniſter of God, and in the caſe of the Savoy after judgement given in the Exchequer, Error was brought in the Exchequer chamber, according to the Statute of 31 *E.* 3. *ca.* 12. And there it was agreed by the Barons before all the Judges of England, that the leaſe was good, notwithſtanding the miſnomer of the Foundation. And in ſome caſe variance in name of

the Corporation ſhould never hurt, where ſuch variance in name of Baptiſm ſhall hurt. And to prove that, he cited 11 *H.*4. and alſo he ſaid that the other variance *juxta Newbery* is not materiall, for in 9 *E.* 4. that warranteth it, and it may be *Donington* is *juxta Newbery*. *Fenner*] I am of the ſame opinion, but yet I will be adviſed. *Popham*] I am reſolved, and I think that the argument of my brother *Gawdie* had need to be well anſwered; and after *in Termino Mich.* 39. & 40. *Eliz.* this caſe was argued again, and it was ſaid that in 24. *Eliz. inter Wilgate & Hall*, the caſe was, that the Dean and Chapiter of *Windſor* were founded by the name of *Decanus Reginæ capellæ de Windſor*, And they made a leaſe by the name *Decanus Reginæ capellæ de Windſor*, and for that this word *Reginæ* was added to the leaſe, which was not in the Foundation, therefore the leaſe was adjudged void. *Gawdie*] It ſeemeth the leaſe is good, and that the variance ſhall not hurt, for we ought to make ſuch conſtruction if we may, that the leaſe ſhould be good, and for that 11 *Eliz.* 278. *Incorporation per name de Dean & Chapter Eccleſiæ cathedralis ſanctæ & individuæ Trinitatis Carlill* made a leaſe for yeares by name *Decanus Eccleſiæ cathedralis ſanctæ Trinitatis in Carlill, et totum capitalium de Eccleſia prædicta*, and the better opinion was that the leaſe was good, notwithſtanding the variance, becauſe it is not in ſubſtance of name, and 5 *Ed.* 4. 20. Obligation was made *Abbati Monaſterii de M extra muros Eborum*. And in debt brought the Writ was *quod reddat Abbati Monaſterii de M. Ebor.* leaving out theſe words *extra muros*, and holden good, notwithſtanding the variance, and yet then the party might have had a new Writ; *Et a fortiori* in this caſe, for here he can never have a new leaſe, and if a leaſe agree in effect and Subſtance with the Foundation, albeit there be variance in words between the grant and the Foundation, yet the leaſe is good. As if one ſaid that *T. K.* is Executor, of the Teſtament of *I. S.* It may be ſaid that that *T. K.* is *I. S.* Executor, and in this caſe if it had been *Miniſter Dei pauperis domus Dei de Donington*, there the Addition of this word *Dei*, after the word *domus*, ſhall never hurt. *Fenner* Juſtice ſaid it ſhould hurt, for it cannot be intended the ſame Corporation, and for that it is a materiall variance, for there are two Genitive caſes, & the laſt of them may not be governed by the firſt Subſtantive, for in conſtruction it may never be ſo conſtrued. And when the King puts a name upon a Corporation, this name ought to be ſtrictly obſerved: For they have no other capacity than by this name. And every Corporation conſiſteth of two parts, That is to ſay of Perſons, and of the place of their Foundation, and here *Miniſter Dei* is the Perſon, and *pauperis domus de D.* is the Foundation; by which, when part of the name of the Perſon is omitted, *viz.* this word *Dei*, and added to the Foundation, there is a materiall variance. *Clynch* ſaid the Leaſe

Two parts of every Corporation.

Leaſe was good, for ſayd he the Miniſter of God of the poor houſe of *D.* and the Miniſter of Gods poor houſe of *D.* are all one; for when our Saviour Chriſt came to *Jeruſalem*, and there ſaw the buying in the Temple, he ſayd to the buyers, you have made the houſe of God the den of Theeves; for the houſe of God is the place where God is ſerved. *Popham contra*] For if the Corporation had been *Miniſter domus Dei de D.* and a Leaſe had been made by name *de Miniſter domus de D.* omitting this word *Dei*, every one will agree that this is voyd; but if a further addition be made to the Corporation, the Leaſe is true, allbeit that it be varying, as if the Leaſe had been *Miniſter Dei omnipotentis*, the addition of this word *omnipotent*. ſhall not hurt, *& ſic de ſimilibus.*

Addition ſuperfluous ſhall not hurt.

And allbeit that it be not agreeing in words, yet if it agree in common underſtanding, it is good; but if in common underſtanding, the grant may not be taken according to the Foundation, if it be not wreſted to an unexpected underſtanding, there it is not good; and if the Foundation had been in Engliſh words, Miniſter of God of the poor houſe of *Donington*, and the Leaſe by name of Miniſter of the poor houſe of God of *Donington*, every one will agree that this is palpable variance, and the Leaſe not good. And I doubt of the caſe of *Everwick*, for there the *Prior beatæ Mariæ* brought an action by name of *Prior beatæ Mariæ extramures civitatis Ebor.* and if this caſe were now to be adjudged, that would be variance, as the caſe of *Briſtoll*, *Prior beatæ Mariæ de Briſtoll*, made a Leaſe by name of *Prior beatæ Mariæ juxta Briſtoll*; and this Leaſe was adjudged voyd; but if the caſe had been *de Everwick juxta muros civitatis Ebor.* this had been no materiall variance, for it had been but an explanation, which will never hurt; and for that the Court was ſo divided in opinion, that is to ſay, two againſt two, and the caſe concerned a poor houſe, They moved the parties to comprimiſe.

Common underſtanding.

8.

Uſwell brought diſceipt againſt *Vaughan*, and declared that the Defendant *ſciens* that he had no title to the Advowſon of *D.* took upon him to be owner of that, and ſold the profits of the ſayd Advowſon to the Plaintif, *pro quadam pecuniæ ſummâ*. And it was pleaded in arreſt of Judgement, for that the Plaintif did not aver, *ubi revera* the Defendant had no title, *& non allocatur.*

Diſceipt.

9.

Burrough versus Taylor.

Payment of rent the reversion being granted away by the Queen.

Election.

The common receipt of the Exchequer.

No prerogative can be granted over.

THe case was that the Queen made a Lease for years, rendring rent at the receipt of her Exchequer, or to the hands of her Baylif, upon condition, that if the rent be not payd, that the estate shall cease; after the Queen granted over the reversion; and whether the rent shall be now tendered upon the land, or at the receipt of the Exchequer, or to the person of the Assignee of the reversion, was the question; and it was adjudged that the Grantee of the reversion ought to demand the rent upon the Land, or otherwise he shall not re-enter for the condition broken, & that for two causes, the one, for that that when the reversion was in the Queen, the Lessee had election to pay it at the receipt of the Exchequer, or to the hands of the Queens Baylif, and when the Queen had granted over the reversion, the election of the Lessee is tolled, by which now the rent shall ensue the nature of other rents reserved by common persons, and those are payable upon the lands: another reason is, every rent reserved by the Queen is of common right payable at the receipt of the Exchequer, or to the Baylifs of the Queen, without words appointing at what place it shall be payd; for these are the usuall receipts of the Queen, and so the words which appoint that to be payd at the receipt of the Exchequer, or to the hands of the Baylif of the Queen, are idle words, for that the Law appointeth so much of common right, *ex prærogativa Regis*; but when the reversion is transferred into the hands of a common person, there this Prerogative ceaseth, for it cannot be granted to a common person; and by consequence the rent shall be payd upon the Land.

10.

Error.

No amendment in point of judgement.

THomas VVelcome, Executor of *Anthony VV.* Executor of *John VVelcome*, brought a Writ of Debt against *S. S.* in the Common-place, and Judgement was given, and entred, *quod prædictus Johannes VVelcome recuperet*, where it should have been, *quod prædictus Thomas VVelcome recuperet*, and for that Error was brought, and Serjeant *Heale* moved that the Record might be mended, for that it was the mis-entring of the Clerk, but adjudged to the contrary, for the Judgement is the act of the Court, and not of the Clerk.

11.

Abuttals.

EDmund Nevell brought an Action of Trespass against *J. Sayle*, and declared *Quare clausum fregit in quodam loco vocato* Clavering-field, *abuttan. super quoddam molend. in tenura J. S. Opinio Curiæ*] If the

the Plaintif do not prove his Buttals, he is gone. And for that he could not prove that the Mill was in the tenure of *J. S.* the Jury being at bar was discharged; and howbeit that there be a way between the Close and the Mill, yet the Buttall is good.

12.

Slanderous words.

Richard Somerstailes brought an Action upon the case for slanderous words, that is to say, *R. S. is a very bad fellow, for he made J. S. drunken in the night, and consened him of an hundred Marks*; and upon not guilty pleaded it was found for the Plaintif, and Judgment was stayed, for the words are not sufficient to maintain an Action.

13.

Mortgage.

IF the Heir of the Morgagee is in Ward, and the Morgager payeth the money, his entry is not lawfull upon the King, but shall be put to *monstrans de droit*, *per Popham* chief Justice.

14.

Award of part onely.

Amond brought Debt upon an Obligation against *Hatch*, and the Condition was, That if the Obligor do well and truly perform and keep the Award of *J. S.* Arbitrator indifferently chosen between the Plaintif and the Defendant, for, and concerning the matters contained in 9 severall Articles, bearing date the day of these presents, So that the same be given up under the hand and seal of, *&c.* And the Arbitrator made an award of 7 of the sayd Articles, omitting the other two; and whether the Obligor ought to perform this Award, was the question. *Man.*] I think he ought to perform the Award, for that he is bound by Obligation to perform it, and to prove that he cited 5 *Edw.* 4. 19 *Hen.* 6. & 17 *Edw.* 4. *Gawdy*] The words of the Condition are, so that the same Award be given up in writing before such a day; and that shall have reference to all the Articles; for the Submission was conditionall, as 14 *Elizab.* And after Judgement was given *quod quer. nihil capiat per billam.*

15.

How *against* Broom *and others.*

Rent extinct by impairing the estate.

A Man leased a House and a Close, rendring rent, and the Lessor entered into the house, and pulled that down, and after the Lessee re-entered into the Close, and whether the rent were revived or not, was the question. And *Popham* and *Gawdy*] The rent is not

 revived

revived; and that the Lesse shall hold the Close discharged of any Rent, by the folly of the Lessor to impair the estate of the Lassee.

16.

Error. *Ownall* brought a Writ of Formdon against *Catesby* in the Common-place, and there was a speciall Verdict found, and Judgement given, for a default in the Writ, against the Plaintif, and the Plaintif brought Error, and alleged for Error, that after Verdict given no default in the Writ shall prejudice the party, *per le Statute de 18 Eliz. cap. 14.* *Popham* chief Justice sayd, if there be no Writ, *Insufficient Writ not holpen.* it is holpen by the Statute, but it is otherwise if there be an insufficient Writ in matter, for that is not holpen; but a Writ that is insufficient in form, and sufficient in matter, is holpen: And in every Writ of Formdon there are two things requisite, the one is the gift, the other the conveyance to the Demandant; and if either of these two fail, the Writ is insufficient in substance, and is not holpen by the Statute.

17.

Slander of a Counsellor at Law. *Peter Palmer* of *Lincolns* Inne brought an action upon the case against one *Boyer*, and declared how he was an Utter-barrester of the Law, and got his living by practising of the Law, and was Steward of divers Courts, and namely of one *John Petty* Esquire, and the Defendant *præmissorum non ignarus*, to the intent to prejudice the Plaintif in his good name and practise, sayd of the Plaintif these English words, *viz. Peter Palmer is a paltry Lawyer, and hath as much Law as a Jackanapes*; and it was pleaded in arrest of Judgement, that the words would not maintain an action, for they are not slanderous; for it is not sayd, he hath no more Law than hath a Jackanapes, for then it had been clear that the action is maintainable, for by that he had abated the opinion of his Learning, but it is not so in this case; for the words are, that he hath as much Law as hath Jackanapes, and this is no impeachment of his Learning, for every man that hath more Law than Jackanapes, hath as much; *Et non allocatur*, for the comparison is to be taken in the worst sense, and *tant amounts* that he hath no more Law than Jackanapes, *per quod* Judgement was given for the Plaintif, for this is a slander in his profession by which he doth acquire his living.

18. One

18.

ONe libelled in the Spirituall Court for Tithe of Billet, Faggot and Talwood, And averred that it came of Birch, Maple, Haſell, and Hume, and thereupon a Prohibition was ſued, ſurmiſing that they came of Oke, Aſh, Elm, and Birch. And in the Spirituall Court allbeit one Libell for wood of one nature, and that is found of another nature; yet ſentence ſhall be given for the Plaintif. The Court ſaid that was abſurd, and therefore they would hear a Civilian ſpeak to that point. *Cook* Attorney Generall] If conſultation ſhall not be granted, then farewell all Tithe of Wood, for in truth in every faggot of Birch, there is put a great ſtick of Oak, or Aſh, intending by that to privilege the whole faggot of Tithe. *Nam creſcit in orbe dolus. Webb, Clark*, ſaid, the cunning is of your ſide to Libell for fagot; For if you had Libelled for Maple, Birch, or Haſell, no Prohibition would have been ſued. And it was adjudged in this Court in *Molins* caſe, one Libbelled for billet and fagot generally, without ſhewing of what Wood they were made, And upon pleading upon the Prohibition, it appeared to the Court that part was tithable, and part not. And for that they could never obtain a Conſultation. *Cook*] It doth not appear here that there was any mixture, ſo the caſe is not like. *Webb*] You have no Right to have Tith of fagot, for that part thereof is not tithable being Oak, ſo by your Covetouſneſs to have more than is your Right, you have loſt that that is your Right, *Et adjornatur*. And after at another day in the ſame Term, it was moved again by *Savile* which ſaid, that it was adjudged in *Lanes* caſe, that tith ſhall never be paid for Haſell-wood wich is mixt with Oak in fagots, *quod Gawdie negavit. Fenner*] He ought to have pleaded the ſpeciall matter to have had a Conſultation, *viz* how much of the fagot was Haſell, for ſo it was done, *inter Molins & Dames*. And therefore foraſmuch as it is not ſo done, Conſultation ſhall not be granted for no part of that, and of this opinion were all the Juſtices, *quod nota*.

Prohibition.

Abſurd practiſe of the ſpirituall Court.

Partable tithable.

Lanes caſe.

Seeciall pleading.

19.

NOta *per* Maſter *Kemp* Secondary of the Kings Bench Office, if a *Latitat* goeth forth againſt the Husband and Wife, and the Husband onely is taken, The Husband ſhall find ſurety for himſelf and his Wife, or otherwiſe he ſhall lie in Priſon untill he find bail as well for his Wife as for himſelf, and ſaid, that this hath been the uſe of the Kings Bench by the ſpace of forty years of his knowledge.

Appearance.

Scire

20.

Usury after Judgement. *Scire facias* was brought by *Middleton* againſt *Hall*, to execute a Judgement. The Defendant pleaded that he borrowed of the Plaintif 100. l. to give him 120. l. for the loan thereof for a year; And the Plaintif for his aſſurance would have the Defendant confeſs this Judgement of 120. l. And ſo he pleaded the Statute of Uſury in bar to this *Scire facias*, and upon that the Plaintif demurred in Law, *Godfery* prayed Judgement for the Plaintif. The words of the Statute of Uſury are all Bonds, Contracts, and aſſurances Collaterall, or other, made, *&c.* ſhall be utterly void; But here this Judgement may not be ſaid any aſſurance for the money, but is a Judgement upon the aſſurance, for which, *&c. Clark contra.* But the whole Court being twiſe moved, held clearly that this is no plea to defeat a Judgement; But if ſuch matter had been, the Defendant ought to have pleaded that, upon the firſt Action in bar, and ſo not to ſuffer the Judgement. *Popham*] Here are two inconveniences, one to defraud and defeat the Statute of Uſury, the other to avoid Judgements upon ſuch ſuggeſtions which might be pleaded in bar in the firſt Action; and after the Plaintif had Judgement to recover.

21.

Slander of an Attorney. *Martin*, Attorney of the Kings Bench, brought an Action of the caſe againſt *Burling* for ſlanderous words, *viz. Martin*, is he your Attorney? he is the fooliſheſt and ſimpleſt Attorney towards the Law; And if he do not overthrow your cauſe I will give you my ears, he is a fool and an aſs, and ſo I will prove him. If theſe words be actionable or not was the queſtion, in arreſt of Judgement after Verdict for the Plaintif, and the Court ſeemed *prima facie*, that they are not. But after the caſe was moved by *Harris* for the Plaintif, and then by the conſent of all the Court Judgement was given for the Plaintif; And *Popham* ſaid, that to ſay that an Attorney will overthrow his Clients cauſe is an Actionable ſlander.

22.

Error for non ſummons. *Collet* brought a Writ of Error againſt *Marſhe*, upon a Judgement given in the Common place in a *præcipe quod reddat*, And aſſigned for Error, for that by the Statute *de* 31 *Eliz. cap.* 13. it is inacted for the avoiding of ſecret ſummons in reall Actions, without convenient notice of the Tenants of the Freehold, that after every ſummos upon the Land in any reall Action, fourteen daies at the leaſt before

before the Retorn thereof, Proclamations of the ſummons ſhall be made on a Sunday, at, or near the moſt uſuall door of the Church or Chapell of that Town or Pariſh where the Land, whereupon the ſummons were made, doth lie, and theſe Proclamations ſo made as aforeſaid, *&c. ut in Statuto.* And in this caſe, there was not any Proclamation made at the Church door; And whether the Plaintif ſhall have an Averment againſt the Sherifs Retorn was the queſtion. And adjudged that the party ſhall not have the Averment againſt the Retorn of the Sherif: For if the Retorn be falſe, the party ſhall have an Action upon the caſe againſt the Sherif. *No averment against a Sherifs retorn.*

23.

Portman brought an *ejectione firmæ* againſt *Willis*, and a ſpeciall Verdict was found, that *Roger Hill* was poſſeſſed of a Leaſe for years, and gave divers perſonall Legacies to ſeverall perſons, and gave all his other goods and Chattells to his Wife, and whether the Wife ſhall have this Term, being a Chattell reall, or not, was the queſtion.

24.

Gray brings Treſpaſs againſt *Trowe*, for entring into his Cloſe, and taking of Fiſh out of a Fiſh-pond with nets and other Engines; The defendant pleaded that long time before the Treſpaſs was done, one *Thomas Grey* was ſeiſed of the Cloſe and Pond, and put the Fiſhes into the Pond, and after the ſaid *Thomas Grey* made the Defendant his Executor, and died; And he as Executor took the ſaid Fiſhes, and upon that the Plaintif demurred, and it was adjudged that the Heir ſhall have the Fiſhes in the Pond, and not the Executors, for they are Chattells deſcendable, but by *Clinch* it is Fellony to take them. *Popham*] If they be in a Trunck ſo that they may be taken out by the hands of men, without nets or other Engins, there it is Fellony, but otherwiſe it is not Fellony. *Fiſh in a pond.* *Chattells deſcendable.* *Felony.*

25.

Thynn brings Debt againſt *Cholmeley* for 300. p. of arrerages of a *nomine pœnæ*, and declared of a Leaſe for years made by him to one *Agar*, rendring Rent, And if default of payment be made of payment of the ſaid Rent, at any day in which it ought to be paid, that then & ſo often the ſaid *A.* his Executor and Aſſignes ſhall pay 3. ſ. 4. p. for every day, untill the aforeſaid Rent ſo behind ſhall be ſatisfied, And ſhewed how the Rent was behind and not payed for two years; *Nomine pœnæ againſt an Aſſignee.*

But doth not ſay that he demanded the Rent. *Jackſon*] The ſum demanded, is by computation more than is due, reckoning but iij. ſ. iiij. d. for every day that the Rent is arrear. And if that be his intent he demands too little, for in two years that will be infinite. *Gawdy*] It ſeemeth that he ſhall not have but onely iij.ſ. iiij. d. for every day. *Fenner*] I think he ought to make demand of the Rent, or otherwiſe he ſhall never have the *nomine pœnæ*. *Gawdy*] No truly, no more than in debt upon an Obligation, and he cited 21 *Hen.* 6. 21 *Edw.* 4. & 22 *Edw.* 4. *Fenner*] The caſes are not alike, for in debt upon an Obligation there is a duty, but otherwiſe it is of Rent. And it was agreed that the action well lieth againſt an Aſſignee in this caſe.

In demand.

26.

Slander. HUmphrey *Parlor* brought an Action upon the caſe for words againſt *I. S.* And the words were theſe, *viz.* *Parlor* was in Priſon in a Jail for ſtealing of Mr. *Piggots* Beaſts; and it was pleaded in arreſt of Judgement, that the Action doth not lie, foraſmuch as it is not preſciely alleged and affirmed that he ſtole the Beaſts: But by Implication. Nevertheleſs Judgement was given for the Plaintif, for by *Fenner*, if he had ſaid he had been in Priſon for ſuſpition of ſtealing Mr. *Figgots* Beaſts, no Action will lie, for a treue man may be ſuſpected: But here is a direct affirmance of ſtealing; For a man cannot be impriſoned for ſtealing, if he do not ſteal.

27.

Proviſo. THe Earl of *Pembrook* brought an Action upon the caſe againſt *Henry Barkley militem*; and the caſe in effect was ſuch, that the late Earl of *Pembrook*, Father of the now Plaintif, was ſeiſed in Fee of the Mannor of *D. in comitatu Somerſet*, and by reaſon of that, he had the Office of Liuetenantſhip in the Forreſt of *Cromcelwood*, and of all the Walks in that. And by reaſon of the ſaid Office, had all the commandement of the game within the Forreſt, and he ſo ſeiſed, the Earl granted to Sir *Maurice B.* Father of the now Defendant, and to the Heirs Males of his body, the Keeperſhip of a walk called *S.* in the Weſt part of the Forreſt, and in the ſaid Deed of grant were ſuch words, Provided allwaies, and the ſaid Sir *Maurice B.* doth Covenant and grant, to, and with the ſaid Earl of *Pembrook*, that it ſhall and may be lawfull to and for the Earl, his Heirs and Aſſignes, to have the preheminence of the game within the ſaid Walk; Provided allſo, and the ſaid Sir *M. B.* doth further Covenant and grant to and with the ſaid Earl, That neither he, the ſaid Sir *M.* his Heirs or Aſſignes

Assignes, shall or will cut down any Timber-trees growing within the said Walk. And after Sir *M. B.* died, and the said Sir *H.* was his Son and Heir, and cut down Trees within the Walk. And the Lord of *P.* commanded his servants to enter into the said West-walk, and there to Walk; And Sir *H. B.* did disturb them, and upon that the Action was brought, and the point of the case was, if the wordes in the second Proviso make a Condition, or but a Covenant. *Gawdy*] I doubt of the case; for all the question of the case is, if it be a Condition, or but a Covenant; And as I am now advised, thit is but a Covenant, and no Condition. For in all cases where this word (Proviso) ought to make a Condition, there ought to be a perfect sentence to explain the meaning of the parties, or otherwise it is no Condition. As if the wordes are provided allwaies that if the Rent be behind, and say no more now, this is no Condition And here all the sense comes in after the words of Covenant, and these words are the words of Sir *M. B.* And for that it seemeth no Condition; for if the words had been, And it is provided by Sir *M. B.* there it is clear no Condition. But if in a Lease for yeares be words, and the Lessee do provide, that if the Rent be behind, that then the Lessor shall re-enter, there I agree that this makes a Conditon. And in the case put by my Brother *Williams*, a Lease made, *& provisum est quod non licebit* to the Lessor, to grant over upon pain of forfeiture, there is a good Condition; But otherwise it shall be, if *sub pœna forisfacturæ* were omitted. *Fenner*] I think it is a a Condition, for all the words put together, explain the meaning of the parties, as if he had said upon Condition, And the Lessee doth Covenant and grant, and none will deny but that this is a Conditidition. *Clinch* seemed that it is no Conditon, for the words may not be used as a Covenant, and allso as a Condition. As where a grant is by Deed, by words of *Dedi, concessi, & confirmavi*, the Deed may be used as a Grant, or confirmation, at the Election of the party; But it cannot be used in both sorts. *Popham*] I think that the Proviso as it is here placed will make a Condition, and yet I will agree, that a Proviso shall be sometimes taken for a Condition, and sometimes for Explanation, and sometimes for a Covenant, and sometimes for an Exception, and sometimes for a Reservation; and it is taken for a Condition; As if a man Lease Land, provided that the Lessee shall not Alien without the Assent of the Lessor, *sub pœna forisfacturæ*, here it is a Condition; and if I have two Mannors, both of them named *Dale*, and I Lease to you my Mannor of *Dale*, Provided that you shall have my Mannor of *Dale* in the Occupation of *I. S.* here this Proviso is an Explanation what Mannor you shall have; and if a man Lease a house, and the Lessee Covenanteth that he will that maintain, Provided allwaies that the Lessor is contented to find great Timber,

here this is a Covenant; and if I Leaſe to you my Meſſuage in *Dale*, provided that I will have a Chamber my ſelf, here this is an Exception of the Chamber; and if I make a Leaſe rendring Rent at ſuch a Feaſt as *I. S.* ſhall name, Provided that the Feaſt of St. *Michael* ſhall be one, here this Proviſo is taken for a Reſervation; and in our caſe, if the words had been provided allwaies that the Donees ſhall cut down no Trees, and the Leſſee doth Covenant he will not fell any, here every one will agree that it is a Condition, aud allſo a Covenant; And in this caſe in my opinion, this *tant amonnts*. Serjeant *Williams* and *Cook* Attorney for the Plaintif. *Atkinſon* and *Tanfield* for the Defendant.

Slander.

28.

Aſſels the Father, brought an Action upon the caſe againſt *Laſſels* the Son, for words, *viz.* he, *quendam Thomam Laſſels fratrem ejuſdem Def. innuend.* ſtole a Mare, and you, *innuend. querent.* knowing the ſame, conveyed her into the Fenns to my Brother *B.* his houſe. *Clinch* and *Gawdy* ſeemed the Action maintainable. *Fenner econtra.*

Indictment.

29.

A Man was indicted for ſtealing of a hat and a band, and other ſuch things; And the Priſoner ſaid, that he was before that time indicted for goods ſtolen the ſame day and time, and acquitted. *Gawdy* ſaid, he may not be ſeverally indicted for goods ſtolen at one time. As if a man ſteal a dozen of ſilver ſpones, he may not be indicted for two in one Indictment, and for other two in another, *& ſic de ſingulis. Clinch accord. Fenner*] Yes truly, for it was the caſe of *Thomas Cobham*, the which was indicted for goods taken in two ſhipps, and acquitted, and after condemned for other goods taken at the ſame time.

Preſcription by a Copyholder.

30.

Pearce brought an Action upon the caſe againſt *Barker*, and declared how within the Mannor of *Dale*, time out of mind, there had been divers Copyholders, and during the ſame time, there hath been a uſage within the ſaid Mannor, That every Copyholder for every Acre of Land ſhall have Common in ſuch a Waſt of the Lords for two Beaſts; And ſhewed how the Plaintif is poſſeſſed of twenty Acres, and by reaſon of thoſe, ought to have Common for forty Beaſts. And there hath the Defendant being Leſſee for years of the ſame Man-

Mannor, one Conigray within the ſame Waſt, by which the Conies have ſo digged the ground, that his Beaſts cannot have Common as they were wont to have. *Fenner*] A Copyholder may not preſcribe but in right of his Lord; but now the Lord *pro tempore*, is party to the action, and whether this will alter the caſe or not, I doubt. *Glanvile*] Albeit the Copyholder may not preſcribe but in right of his Lord, yet by way of uſage, as this caſe is, it hath been adjudged that he may make his title.

31.

Indictment.

A *Rundell* was heretofore arraigned upon an Indictment of willfull Murder for the death of one *Parker*, and was found not guilty of Murder, but guilty of Manſlaughter, for which he pleaded the generall pardon, *de* 35 *El.* And the Queens Attorney alleged, That in the ſayd generall pardon there is an exception of all perſons being in priſon by the commandement of one of the Privy-counſell; and ſaid, that the ſayd *Arundell* was committed by the Lord Chamberlain for ſuſpition of the ſayd Felony, and for the ſame in priſon at the time of the Parliament, and ſo a perſon exempted. To which it was ſayd by the Defendant, that long time before the ſayd Parliament, and after the ſayd commitment by the Lord Chamberlain, there went out of this Court a *Corpus cum cauſa*, by force of which he was ſent into this Court, with the cauſe of his commitment, and was for the ſayd offence committed by this Court to the *Marſhalſey*, and there was remaining at the time of the Parliament by force of the commitment of this Court, and it ſeemed by the better opinion of the Court if a man be committed by a Privy-counſellor, and removed by *Habeas corpus*, and committed by this Court, he ſhall be now ſayd impriſoned by commitment of this Court, and not of the Privy-counſellor.

Commitment.

32.

Error.

S*Taughton* brings a Writ of Error againſt *Newcomb* upon a Judgement given in Debt in the Common-place, and the firſt Error aſſigned was for that the originall Writ was xx l. and all the mean Proceſs were ſo likewiſe, but when the Defendant appeared to the *Exigent*, the entry was, *quod defendens obtulit ſe in placito debiti decem librarum*, where it ought to be xx l. *Dodderidge*] I think it ſhall be amended; for it is the miſpriſion of the Clerk, and to prove that, he cited 37 *Hen.* 6. 44. *Ed.* 3. 18. But upon view of the Record it appeared that no originall was certified, and therefore could not be amended.

33.

Deviſe. *Jeſtione firme inter Bulleyn & Bulleyn.* *Cook* Attorney Generall] The caſe is, that *Simon Bulleyn* being *ceſtus que uſe*, before 27 *H.*8. *Limitation.* Deviſed to his Wife certain Land for her life, & that after her deceaſe *Robert Bulleyn* his eldeſt ſonne ſhall have the land ten pound under the price it coſt, and if he dyed without iſſue, that *Richard Bulleyn* his ſecond ſonne ſhall have the land ten pound under the price it coſt, and if he dye without iſſue of his body, then his two Daughters *A.* and *B.* ſhall have the land, paying the value thereof to the Executors of his Wife; and allſo by the ſame Will he deſired his Feoffees at the requeſt of his Wife to make Eſtates accordingly. The chief queſtion, and knot of the caſe is, whether *Robert Bulleyn* the Deviſee hath an eſtate tayl or not; and he ſayd it ſeemed to him, he had but an eſtate tayl: and for that we are to ſee whether the payment ought to precede, or is ſubſequent to the eſtate; and I think it is ſubſequent to the eſtate; For the words are, my ſonne *Robert* ſhall have my land ten pound under the price it coſt, and ſo by the words he ought to have the land before any payment; *Limitation.* and I think he ſhall have the land by courſe of limitation; and if he doe not pay the money, that *R. B.* ſhall have the land as Heir by li- *crickmores caſe* mitation; and for that purpoſe he cited *Crickmores* caſe in 3 *Eliz.ab.* where a man had two Daughters, and deviſed his land to his eldeſt daughter, paying to the youngeſt ten pound; there the eldeſt had all the land till ſhe failed of payment of the ten pound, and then it *Vellock & Heymonds caſe.* was adjudged that the youngeſt ſhould have the moity by way of limitation. And 32 *Eliz.* it was adjudged in this Court *inter Vellock & Heymond*, where a man deviſed Burrongh Engliſh land to the eldeſt brother, paying to the youngeſt ten pound, and after the elder failed of payment, and the youngeſt entered by way of limitation. And in this caſe theſe words, that *Robert* my ſon ſhall have my land ten pound under the price it coſt, will make a condition, as well as if he had ſayd, paying ten pound; and to prove that he cited Sir *Edward Cleres* caſe, that theſe words upon truſt and confidence will not make *Sir Edward Cleres caſe.* a Condition, by reaſon that the Deviſor had a ſpeciall truſt and confidence in the Deviſee; but it is otherwiſe here, and in this caſe the eſtate of neceſſitie ought to precede the payment; for it is appointed that the payment ſhall be made to the Executors of the woman, and ſo if the eſtate doe not precede the payment, then during the life of the woman the Deviſee ſhall have no eſtate; for during her life ſhe cannot have Executors; and ſo by conſequence can there be no payment: Allſo the words of the Will are, I deſire my Feoffees to make an eſtate at the requeſt of my Wife, ſo that his meaning was plain, that there ſhould be an eſtate made in the life of the Wife, for after

her

her death ſhe may not make requeſt; but it hath been ſayd, that the ſtate ſhould be Fee ſimple, for that the words are, that he ſhall have the land ten pound under the price it coſt, and ſo theſe words paying ſhall carry the Fee ſimple: And as to that, I ſay that it ſhall not againſt an expreſsed eſtate: And for that 2 *El.* 117. a Frenchman deviſed lands to his Wife for life, the remainder to *C. F.* and to the heirs Males of his body, and if he dye without heirs of his body, the remainder over, and it was taken clearly, that the generall limitation, if he dyed without iſſue of his body, ſhall not alter the ſpeciall tayl, for that the intent is apparent, and allſo he cited *Claches* caſe, and *Atkins* caſe 34 *Eliz.* 33. Allſo in this caſe *Robert Bulleyn* the Deviſee is made Executor to the woman, ſo that if it were a condition ſubſequent, he may not make payment to himſelf, but ſhall have the land diſcharged of the condition, by reaſon of the impoſſibility; as if the woman had dyed inteſtat, there is no perſon to whom the payment ought to be made, and ſo the Deviſee is diſcharged of the condition: Allſo in this caſe the Deviſee being eldeſt ſonne, may not forſake the Deviſe, and take by deſcent, as in 3 *Hen.* 6. 46. it is for the benefit of him in remainder; but if he might waive, he may not waive *in pais*, as 13 *Rich.* 2. Joyntenancy is adjudged: And allſo when he enters at the firſt, he is ſeiſed by the Deviſe, for he hath no other right; for if he might waive, he in remainder ſhall not take. *Et adjornatur*; but the Court ſeemed to lean that the eſtate ſhould be a Fee ſimple. *Expreſſed eſtate*

34.

Bury brought an Action upon his caſe for words againſt *Chappell*, viz. He hath been in *Fowlers* Tub (*innuendo* the Tub of one *Fowler* a Chirurgeon, in which Tub no perſon had been but thoſe which were layd of the Pox) I will not ſay of the Pox, but he lay in the Tub that time that *Lagman* his Wife was layd of the Pox; and tell thy Maſter his hair falls from his head, and he is a pilled Knave, and a Raſcall Knave, and a Villain, and no Chriſtian, and thinks there is neither heaven nor hell; and adjudged that the Action is not maintainable. *Slander.*

35.

A Man is arraigned of Felony and acquitted, but it is found, that he fled for the Felony, he ſhall not loſe his goods that he had at that time of his flying, but at the time of the acquittall, *tit. Corona Fitz.* 296. *Ero. tit. relation* 31. 3 *Ed* 3. *Flight for Felony.*

36.

Variance between emparlance and judgment roll for date of the Obligation.

Wilkinſon brought Error upon a Judgment given againſt him in the Common place. And the caſe was that in Debt brought againſt *Wilkinſon* in the Common place, upon an Obligation bearing date 12. *die Novembris*, the Defendant imparled, and in the next Term the Plaintif declared a new, *prout patet*, upon an Obligation bearing date 12. *Februarii*, and upon *nihil dicit* had judgment. And now in the Writ of Error brought by the Defendant the Plaintif prayes that it may be amended. *Gawdie & Fenner* ſaid it could not be amended, but the Lord *Popham* and *Clinch* ſaid it might be amended.

37.

New triall.

Kelt brought an *Aſſumpſit* againſt *Wright*, and declared that the Defendant in conſideration of 10l. aſſumed to make two lights into one, and upon *non aſſumpſit* pleaded, they were at iſſue, and the Record of *niſi prius* was to make two lights and one, where it ought to be into one, and upon that at the *niſi prius* the Plaintif was *non ſuit*. And it was now moved whether the Plaintif ought to have a new *venire facias* upon the firſt iſſue, inſomuch as the firſt *venire facias* did not iſſue forth upon the firſt Record, and no *non ſuit*: *Et opinio Curiæ*, that he may go to a new triall, but whether he ſhall have a *venire facias de novo*, or that the old *venire facias* ſhould ſerve, the Court doubted, for that the firſt Jury was ſworn.

38.

Abatements.

Ford brought an Action of Debt againſt *Glanvile* and his Wife *Adminiſtratrix bonorum & Catellorum quæ fuerunt Johannis S. durante minore ætate T. S.* The Defendant pleaded that hanging this action againſt them, the ſaid *T. S.* during whoſe nonage the Wife was Adminiſtratrix, came to full age: and if this were a good Plea or no was the queſtion, And adjudged a good Plea.

39.

Free-hold of a Juror.

Upon an information againſt Sr. *Chriſtopher Blunt* a Juror was challenged for want of Free-hold, and by examination was found that he had 20 ſhillings a year. *Fenner* and *Gawdy* doubted whether this be ſufficient Free-hold or not, *Popham* and *Clinch* held it is ſufficient, for the Statute binds not the Queen, and by the Common law if he had any Free-hold it was ſufficient. *Fenner*] This is a Statute made for the benefit of the Common-wealth, and therefore the

the Queen ſhall be bound by it, though ſhe be not named in it. *Gawdy*] Me thinks every Juror ought to have 40. ſ. Free hold at the leaſt, by the Common-Law. *Cook*] No certainly, and if they doe take the Law to be ſo, they may have a bill of exception. *Tanfield*] Wee cannot have a bill of exception againſt the Queen; ſee the Statute of 1 *Hen.* 5. cap. 3. that that is between party and party, and the Statute of 8 *Hen.* 6. the preamble is between party and party. But *Popham* commanded the Jury to be ſworn, but *Gawdy* would have ſent to the Juſtices of the Common Pleas for their opinion, but the Juror was ſworn by Commandment of *Popham*, againſt the opinion of Juſtice *Fenner*.

No bill of exception againſt the Queen.

40.

PEr *Cook*; If I am bound in an Obligation in *Lent* upon Condition to pay a leſſer ſum, *in quarta ſeptimana quadrageſimæ proximæ futuræ*. This money ſhall be paid in *Lent* Twelvemonth after; And ſo it is upon the Feaſt day of St *Michael*, I am bound to pay a leſſer Summe upon the Feaſt day of Saint *Michaell*, *prox. futur.* without queſtion ſaid he, it ſhall be paid the Twelvemonth after, and not the inſtant day.

Proxime futture.

41

THE Duke of *Norfolk* Morgaged certain Lands to *Rowland Haward*, Alderman of *London*, upon Condition, that if the ſaid Duke do repay to the ſaid Alderman a certain Sum of money; That then the Duke might re-enter, and after the Duke was attainted before the day of payment, and all his Lands, Tenements, and Conditions were given to the Queen; And the queſtion moved at the Table in the Serjeants Inne, was, whether Sir *Rowland* ought now to make a Demand of the money upon the Land, or to demand that at the Receipt of the Exchequer, or that the Queen ought to make the tender upon the Land; And it was agreed by all the Judges and Serjeants at dinner, that the Queen ought to make no tender; But the Alderman ought to make his Demand at the Exchequer, and not upon the Land.

Demand.

Condition given to the Queen.

42.

REdfrein againſt *I.S.* an Action of the caſe was brought for words, *viz.* I was robbed, and you were privy thereunto, and had part of my money. It was pleaded in arreſt of Judgement, that the words will not maintain an Action; For that a man may be privy to a robbery

Slander.

bery after that it is made, and have part of the money by honeſt meanes, and therefore it is no ſlander; but the whole Court held the contrary; as well as you are infected with a robbery and ſmell of the ſame, will maintain an Action, ſo will theſe words, therefore Judgement was given for the Plaintif.

Infected. Smell of robbery.

43.

Slander. *Meggs* againſt *Griffyth* brought an Action for theſe words, *viz.* A woman told me, that ſhe heard ſay, that *Meggs* Wife poyſoned her Husband in a meſs of milk; and Judgement given for the Plaintif.

44.

A Parſons Leaſe. *Revell* againſt *Hart*, the caſe was upon the Statute of 13 *Eliz.* of Leaſes made by a Parſon. Serjeant *Harris*] A Leaſe made by a Parſon is not void againſt the Parſon himſelf, no more than a Leaſe made by a Biſhop, which is not void againſt the Biſhop himſelf, as was judged in the caſe of the Biſhop of *Salisbury*. *Fenner*] The Law is as you ſaid, in a caſe of a Biſhop, but the caſe of a Parſon per-caſe will differ. *Popham*] If Rent be reſerved, it is good againſt the Parſon himſelf, otherwiſe not. *Clinch* and *Gawdy*] It is good againſt the Parſon himſelf.

Rent reſerved.

45.

Space in the roll. *Winch* brought a Writ of Error againſt *Warner*, upon a Judgement in a Writ of Debt in the Common place upon Arrerages upon an account; and it was aſſigned for Error, for that the Plaintif in the Common place, in the firſt Declaration left a ſpace for the day and year, And after imparlance, he put in a new Declaration which was perfect. But for that the two Declarations did not agree; and the firſt Declaration is the Warrant of all, and therefore ought to be perfect, therefore the Judgement ought to be Reverſed for this default.

The emparlance roll is the Warrant.

46.

Foractor. It appeared in Evidence *inter Petties* and *Soam*, upon an Aſſumſit for ware bought by the Factor of *Soam*, *per opinionem Cur.* If one be Factor for a Merchant, to buy one kind of Stuff, as Tin, or other ſuch like; and the ſaid Factor hath not uſed to buy any other kind of wares but this kind onely for his Maſter, If now the ſaid Factor buy

buy Saies or other Commodities for his Master, and assume to pay money for that, Now the Master shall be charged in an Assumpsit for the money, and for that let the Master take heed what Factor he makes.

47.

A. *B.* being seised in Fee, made his Will, and devised his Land to his Wife for life, the remainder to his Son in Tail, and if he died without issue, the Land to remain to *R. W.* and his Wife for their lifes; and after their deceases, to their children. The question is, whether the children of *W.* take by descent or as Purchasers. *Popham & Gawdie* were of opinion, that they had an Estate Tail, But *Fenner & Clinch*, but for life. *Devise. 6 Co 16. & Wild's Case.*

48.

William Gerrard was arrested by a *Latitat*, and put in bail by the name of *William Gerrae*, and the Plaintif declared against him by the name of *Gerrart*, and all the proceedings and issue was accordingly, and Judgement was had by Verdict tryed for the Plaintif. And *Gerrard* pleaded in arrest of Judgement, for that there is no bail entred: for the bail is for *Gerrat*, and his name is *Gerrard. Cook* Attorney] He may be known both by the one name aud the other: For in *Norfork* there is a Knight, which in Common speech is called *Barmeston*, but his right name is *Barnardiston*; And if he by the name of *Barmeston* put in bail in this Court, it is good, being knowen by the one and other; and so it seemed the Court did incline for the dangerousnes of the: President For otherwise every man impleaded may give a false name to his Attorney, by which he will be bailed, and then Plead that in arrest of Judgement, but Judgement was giuen for the Plaintif. *Bail by a false name.*

49.

IN debt upon an Obligation, the Condition was, that if the Obligee retorned from beyond Sea before the 22 of *Aprill*, and the Obligor pay to the said Obligee 200. l. before the twenty seventh of *Aprill*, then the Obligation to be void (Otherwise to stand in force) *Cook* moved that the Obligee ought to give notice to the Obligor of his retorning from beyond Sea before the two and twentith day of *Aprill*, or otherwise the Obligor is not bound to pay him the money: For when a thing resteth in the will of another to be done, and the *Notice of a retorn from beyond sea.*

time is uncertain when it ſhall be done, Then notice ought to be given to him which ought to do the thing, as 18 & 19 *Eliz.* 354. *placit.* 32. & 17 *Eliz.* A man made a Leaſe for years, And after made a new Leaſe to Commence after determination, Forfeiture, or Surrender of the firſt Leaſe, with clauſe of Re-entry for *non* payment of the Rent, And after the Leſſor took a ſecret ſurrender of the firſt Leſſee, and after that ſurrender a Rent day incurred, and the Rent was not paid by the ſecond Leſſee, and yet adjudged that his Eſtate is not void, becauſe the other ought to give him notice of the Surrender. *Gawdy*] The caſe is not alike, for 8 *Edw.* 4. a man ought to take notice of an Abitrement. *Fenner*] It ſhall be as dangerous for the Obligee, if he ought to give notice, as for the other to take notice.

50.

Diſtreſs for iſſues for of a ſtrangers beaſts Levant.

STafford brought an Action of Treſpaſs againſt *Bateman*, for taking of a Cow; The Defendant ſaid, that the Land where the Treſpaſs was ſuppoſed to be made, is the Land of one *John Dean*; The which *I. D.* hath loſt iiij. l. iſſues to the Queen, and there came a Warrant out of the Exchequer to the now Defendant, being underſherif, to levy the ſaid iiij. l. in the Lands of the ſaid *I. D.* And becauſe this Cow was Levant and Couchant within the ſaid Land, he took her, as lawfull was for him to doe. *Gawdy & Fenner*] The Sherif may not take Beaſts of a ſtranger in the Land of him that hath loſt iſſues to the Queen. *Popham*] By way of diſtreſs, he may take Beaſts of a ſtranger, if they be Levant and Couchant upon the Land of him that hath loſt iſſues, but not to ſell them, and ſo to levy the Iſſues.

51.

Error.

ERror was brought by *An. Latham*, upon a Judgement given againſt him in a Writ of Debt in the Common place, and the Error aſſigned was, for that the Originall Writ was purchaſed againſt him by the name of *A. L. nuper de London* Yeoman, *alias A. L. de Sherbone in Com. Ebor.* Yeoman. And upon that, the ſaid *An. L.* appeared and pleaded, and was condemned, and after a *Capias ad ſatisfaciend.* iſſued againſt him by the name of *A. L. nuper de L.* Yeoman, *alias A. L. de Shelbvne in Com. Ebor.* Yeoman, and ſo he aſſigned the variance between the firſt Originall, and the *Capias ad ſatisfaciendum*, *Shelbone* for *Sherbone*, but for that this variance was not in the firſt name, but in the firſt Addition, therefore it was adjudged no Error by the opinion of the Court.

Variance in the alias no error.

Langford.

52.

Langford and *Bushy* did present by turns to the Advowson of *Norwinkfield*; *Langford* presented one *A.* which was instituted, and inducted, and dyed; *Bushy* presented one *C.* which *C.* was lawfully deprived by the Bishop of *Covemtrey* and *Lichfield*, without giving any notice to *Langford* who had the next turn: The Bishop made Collation, and after Collation *Langford* sold his moity to *Lee*, and *Lee* to the Earl of *Shrewsburie*: The question was, whether by the Collation *Langford* hath lost his turn. The Court seemed to incline, that by the Collation the turn is lost, for if it had been by usurpation it had been lost without any question. And yet it seemeth, that upon deprivation the Patron ought to have notice. *Vide Statut. de 13 Eliz.*

Quare imp.

Pasch. 43 Eliz.

Collation before notice.

53.

Elverton the Queens Serjeant demanded the opinion of the Court, if a man be seised of land in Fee, and have two Daughters onely, and deviseth his land to his Daughters in Fee, if now the two Daughters shall be Joyntenants, or take by descent as parceners; and the opinion of the Court was, that they are in by the Devise, and not by descent, and so they shall be in as Joyntenants, and not as Parceners; but otherwise it shall be if there were but one Daughter, and the Father devise the land to her; so if he devise the land to his Son and Heir in fee.

Devise.

54.

Nelson and *Sharp* Executors of *Throward* sued a Prohibition against *Gennet* and others, and the case was, that one that had a Legacy devised unto him, sued the now Plaintifs being Executors, for the sayd Legacy, in the Spiritual Court, and the Executors there pleaded, that the Testator in his life time made a certain Obligation sufficient in Law to *J. S.* the which is not yet satisfied, and the Spirituall Court would not allow this Plea, for which he had a Prohibition. *Makin*, Attorney of *Essex*, sayd to me; that this is the second case in question of this point, but he doubted that the pleading was so vitious, that the matter in Law would not come in question.

Prohibition for a Legacy.

Executors represent the person of their Testator, and therefore if a release be made by one of them, this shall bind all; and so if an Action is brought against one Executor where there be divers Executors, and he admit the Writ, and confess the Action, this shall bind all the goods of the dead as well as if they were all named, *Per Hern.*

Action confessed by one Executor by admittance.

55.

Mor. 395. Cro. El. 396 *Election.*

GReningham brought an Action of Debt upon an Obligation against *Ewer*; The Condition was, that if the said *Ewer* doe deliver unto the said *Greningham* certain Obligations which the said *Ewer* hath of the sayd *Greninghams*, or else doe seale such a release as the said *G.* shall devise, before *Mich.* that then, &c. The Defendant pleaded that before the said Feast of St. *Mich.* the said *G.* did not tender to him any acquittance. *Gawdie*] The Obligation is void; for in so much as the Obligee hath not tendred to him any acquittance, therefore he hath tolled from him the election, whereof he shall not take advantage. *Fenner è contra*] for the election is not in the Partie, for the making o the acquittance resteth in the will of the Obligee, and so the Obligor hath no election. *Popham* was of the same opinion.

56.

Execution of a writ done the day of the retorn.

IF a Sheriff doe execute his Writ, the same day that the Writ is retornable, it is a good execution, *per Yelverton*, and he cited these cases. A Judgement given in a *quare impedit*, 18. *Eliz.* and the Writ of dammages was executed the same day that it was retornable, and this matter pleaded in arrest of judgement, and notwithstanding the partie had judgment, and if a *capias ad satisfaciendum* goe forth, and the Sheriff take the Partie the same day that the Writ is retornable, and send him into the Court, who will say that this is not a good execution?

57.

Assets

WOodcock brought an Action of Debt against *Hern*, Executor of *I. S.* The Defendant pleaded, that the Testator in his life time made a Statute Staple to one *I. K.* in the sum of 1000 l. and above that he hath nothing; And if this Plea be good or not is the question. *Fenner*] The Plea is good without question. *Gawdie*] I have heard divers learned men doubt of that; for, if the Testator were bound in a Statute to perform Covenants which are not yet broken, and it may be they will never be broken, and then he shall never be chargeable by this Statute, and yet he shall never be compelled to pay any debts, which will be a great inconvenience. And again, I think there will be a greater mischief of the other part; for, put the case if the Executors doe pay this debt, and the Statute is broken, after he shall be chargeable by a *devastavit* of his own proper goods, the which will be a greater inconvenience.

58

58.

Slander.

Brough againſt *Demyſon* brought an Action for words, *viz.* Thou haſt ſtoln by the high-way ſide. *Popham*] The words are not actionable, for, it may be taken, that he ſtole upon a man ſuddenly, as the common proverb is, that he ſtole upon me, *innuendo*, that he came to me unawares: And when a man creepeth up a hedge, the common phraſe is, he ſtole up the hedge. *Fenner*] When the words may have a good conſtruction, you ſhall never conſtrue them to an evill ſenſe. And it may be intended he ſtole a ſtick under a hedge, and theſe words are not ſo ſlanderous, that they are actionable.

59.

Forfeiture of a copy-hold.

A Copy-holder was not upon his Land to pay his rent, when the Lord was there to demand it: And whether this were a forfeiture or not was the queſtion. *Fenner*] It is no forfeiture if there were not an expreſs denyall; for, the non-payment here is but negligence, the which is not ſo hainous an injurie as a willfull denyal; for, it may be that the Copy-holder, being upon the Land, hath no money in his purſe, and therefore it ſhall be a very hard conſtruction to make it a forfeiture. But if he make many ſuch defaults it may be it ſhall be deemed a forfeiture. *Popham*] If this ſhall not be a forfeiture, there will grow great danger to the Lord, and the Copy-holders eſtate was of ſmall account in ancient time, and now the ſtrength that they have obtained is but conditionally (to wit) pay their rent, and doing their ſevices, and if they fail of any of theſe the Condition is broken, and it ſeemeth cleer if the rent be payable at our Lady day, and the Lord doth not come then, but after the day, to demand the rent, there is no forfeiture.

Demand after the day.

60.

Sir Henry Knevit *againſt* Poole *intereſt of Corn.*

THe Caſe was that there was Leſſee for life, the Remainder for life, and the firſt Leſſee for life made a leaſe for years, and this Leſſee was put out of poſſeſſion by a ſtranger, and the ſtranger ſowed the Land, and the firſt Leſſee for life dyed, and he in remainder for life entred into the Land, and leaſed it to Sir *Henry Knevit*, and who ſhould have the corn was the queſtion. *Tanfeild* argued that Sir *H. K.* being Leſſee of the Tenant for life in remainder, ſhall have the corn; for the reaſon for which a man, which hath an uncertain eſtate ſhall have the corn, is, for that he hath manured the land, and for that it is reaſon that he that laboureth ſhould reap the fruit; but he ſaid that the ſtranger that ſowed the land, ſhall not have the

corn,

Lease of ground sowed.

corn, because his estate begun by wrong; for if a man make a lease for life of ground sowed, and before severance the Lessee dyed, now his Executor shall not have the corn, for that they came not of the manurance of their Testator; so it is if the Lessee for life sowe the land, and assign over his interest, and dye, now the Assigne shall not have the corn, *cansa qua supra* : and for this reason in our case, neither the Executors of the first Tenant for life, nor the Lessee of the first Tenant for life shall have the corn, here, for that it comes not by their manurance; and the stranger which sowed them, he shall not have them; for albeit he manured the land, and howbeit his estate was defeasable upon an uncertainty, yet he was a wrong doer, and the incertainty of his estate came by his own wrong, for which the law will never give any favour to him; and for that when he in remainder for life entreth, it seemeth that he shall have the corn, for he hath right to the possession, and the corn are growing upon the soile, and by consequence are belonging to the owner of the soile; but it hath been said, that here there was no trespasse done to him in remainder, and for that he shall never have the corn. Sir, as to that I say, if an Abator after the death of the Ancestor, enter, and sowe the land, and after the right heire enter, in this case the heire shall have the corn, and yet no trespasse was made to him, and it hath been adjudged in this Court, where a man devised land sowed, to one for life, and after his decease the remainder to another for life, and the first Tenant entred and dyed before severance, and he in remainder entred, that there he in remainder shall have the corn, and by consequence the same Law shall be in our case. *Godfrey è contra*; and he argued that the Lessee for yeers, of the first Lessee for life, shall have the corn; for if Lessee for life, leaseth for years, and this Lessee for yeers sowe the land, and the Lessee for life dye, now the Lessee for yeers shall have the corn, by reason of his right to the land at the time of his sowing, and never lawfully devested by any Act done by himself, and he denyed the cases put by Mr. *Tanfield*, and so concluded. *Gawdie*] The lessee for yeers of the Tenant for life shall have the corn, and he denyed some of the cases put by Mr. *Tanfield*, for in the case where Tenant for life sowes the land, and after assigns over his esttae, now if Tenant for life dye, the Assigne shall have the corn as well as the Executors of the Tenant for life, if he had not assigned over his estate. But I agree the case of the devise for life, of land sowed, with the remainder for life, for there he in remainder shall have them, and the laches of the not entry of the Lessee for yeers shall not prejudice him; for, it appeareth by 19. *H.* 6. if Lessee for yeers of Tenant for life be ousted, and after the Tenant for life dye, yet the Lessee for yeers shall have trespasse, with a *continuando* for all the mean profits; The which proves that they belong to him, so is it in 38.

Assignment after sowing concess. per Popham cont. per Gawdy.

Uncertainty necessarie, unnecessary difference.

Abator soweth.

Cro Eliz 61
2 Dan Abr 765

Devise of land sowne.

Lessee for years ousted.

H. 6.

H. 6. If Leſſee at will be ouſted, and after the Leſſor dye, now the Leſſee ſhall have a treſpaſſe with a *continuando* without regreſs, for, when he may not enter, the law ſupplyeth it, and the mean profits do belong to him. And by conſequence in this caſe the corn belongeth to the Leſſee for yeers, of the Tenant for life. *Popham*] Sir *Henry Knevit* ſhall not have the Corn; for if a man leaſe for life ground which is ſown, and the Leſſee dye, now the Leſſor ſhall have the Corn, and not the Executors of the Leſſee for life. And he agreed with Mr. *Tanfeild* in the caſe of the Aſſignee of Tenant for life, of ground ſowed, and the Tenant for life dye, that he in Reverſion ſhall have the Corn: And if a Diſſeiſor ſow the land of Tenant for life, and the Tenant for life dye, now the Executors of the Tenant for life ſhall have the Corn, and not the Diſſeiſor, nor he in Reverſion; and by conſequence the Leſſee for years of the firſt Leſſee for life in this caſe. *Fenner* was of the ſame opinion; and after it was adjudged that *Knevit* ſhould have the land, and that *Poole* ſhould have the Corn, becauſe of his poſſeſſion.

Leſſee at wil ouſted. Regreſs.

Ground let for life after ſowing.

Diſſeiſor ſow the land of tenant for life.

61.

Rame ſued a Prohibition againſt *Patteſon*, and the queſtion was, if Trees which are above the age of twenty years become rotten, and are cut down for fuell ſhall pay Tyths or not, and the opinion of the Court was, that they ſhall not; for Tythes are payable for an increaſe, and not for a decreaſe; and being once privileged in regard of hie nature, this privilege ſhall not be loſt in regard of his decrepitage.

Prohibition for Dotards.

62.

Cro E 480
mo: 453
Hoy 52: 62

Partridge brought an Action of Debt againſt *Naylor* upon the Statute of 1 & 2 *P.* & *M.* 12. For taking of a Diſtreſs in one County, and driving it into another; and the caſe was, that three men diſtreined a flock of Sheep, and them impounded in ſeverall places, and if every of them ſhall forfeit a hundred ſhillings ſeverally, or but all together a hundred ſhillings. The Court was divided, for the words of the Statute is that every perſon ſo offending ſhall forfeit to the party grieved for every ſuch offence a hundred ſhillings, and treble damages; but *Walmiſley* thought that every one ſhould forfeit a hundred ſhillings, and he put a difference between perſon and party, for many perſons may make but one party.

Impounding.

Common place.

63.

Fine for Error in inferior Courts.

BY *Popham* chief Justice of *England* by the Statute of 28 *Ed.* 3. cap. 10. Erroneous Judgement in *London* was a forfeiture of their Liberties, but after that by the Statute of 1 *Hen.* 4. cap. 15. this was mitigated, and was made finable; as in *Chester*, if they give an erroneous Judgement they shall forfeit an hundred pound; for these inferior Courts which have peculiar Jurisdictions ought to do justly, for if these Courts shall not be restrained with penalties, Justice will be neglected; and before the Statute of 28 *Ed.* 3. those of *London* might not reform Errors in *London*.

64.

Caveat.

NOta *per* Doctor *Amias* in the Lord *Souch* his case, if a Church become voyd, and a stranger enters a Caveat with the Register of the Bishop, that none be instituted to that Church untill he be made privy thereunto, and the Bishop before that he have notice of the Caveat institutes an Incumbent, the Institution is meerly voyd in the Spiritual Law; for the Register ought to notifie the Caveat to the Bishop, and his negligence in that shall not prejudice him that entered the Caveat; and if the Bishop have notice of the Caveat, and gives day to him that puts that in, and before that day he institutes an Incumbent, this is meerly voyd; for the entering of the Caveat is as a *Supersedeas* in our Law.

65.

Day of payment.

THorneton brought an Action upon an *Assumpsit* against *Kemp*, and declared that the Testator was indebted to him in ten pound, and in consideration that the Plaintif would give day to the Defendant, being Executor, to pay that, until *Michaelmas*, he assumed to pay that, *& in facto dicit*, that he hath given day, and yet the Defendant hath not that payd: The Defendant pleaded in bar that *post praedictam assumptionem factam*, and before *Michaelmas*, the Plaintif did arrest him for the same Debt, and demands Judgement, and upon that the Plaintif demurred. *Gawdy*] When he hath given to him day of payment, *usq; ad Michaelmas*, allbeit he arrest him before that time, yet if he do not receive the money before *Michaelmas*, the consideration is performed. *Fenner*] I deny that, for to what purpose is the giving of day of payment untill *Michaelmas*, if in the mean time he may sue him. *Popham*] I agree with my brother *Gawdy*, for insomuch that he onely forbears the payment untill *Michaelmas*, and doth

doth not promiſe to forbear to ſue him, the payment is forborn if the money be not received.

66.

Sherington ſued a Prohibition againſt *Fleetwood* Parſon *de Orrell*, in *Com. Linc.* for that, that the ſayd Parſon libelled in the Spiritual Court for Tyths of Agiſtments, and the now Plaintif being Defendant in the Spirituall Court, pleaded that he had allwayes payd twelve pence by the year for every Milch Cow going in ſuch a Paſture, and for this payment he had been diſcharged of payment of Tythes for all Agiſtments in that land. *Popham*] This payment of money for Milch beaſts ſhall not diſcharge him for the payment of Tythes for other beaſts, and Tythes ſhall not be payd for beaſts fed for the occupatiou of the houſe of the owner; but if a man feed to ſell, there ſhall Tyths be payd for thoſe, for with the firſt people live, which manure the land of which the Tythes are payd, for ſo is *Fitz. Nat. brev.* 53. Q. to be intended.

Prohibition.

Payment for one thing ſhall not diſcharge another.

No tyths for things ſpent in the houſe.

67.

Wildgooſe verſus Wayland in Cancellar. This queſtion aroſe, If *A.* be ſeiſed upon truſt and confidence to the uſe of *B.* and his Heirs, and *A.* ſelleth the land to one that hath notice of the truſt, to whoſe uſe ſhall the Vendee be ſeiſed? Alſo it was moved if before the ſale one come to the Vendee, & ſay to him, take heed how ye buy ſuch land; for *A.* hath nothing in that but upon truſt to the uſe of *B.* and another comes to the Vendee, and ſaith to him, It is not as he is informed, for *A.* is ſeiſed of this land abſolutely, by which the Vendee buyeth the land; if this firſt Caveat given to him, *ut ſupra*, be a ſufficient notice of the truſt or not: And the Lord Keeper ſayd it is not, for flying-reports are many times fables and not truth; and if it ſhould be admitted for a ſufficient notice, then the Inheritance of every man might eaſily be ſlandered. *Cook*] It was holden in *Bothes* caſe in the Starchamber, that if a man ſayd to another, take heed how you publiſh ſuch a Writing, for it is forged, and notwithſtanding the party doth publiſh it, this is a ſufficient notice to the publiſher that the Deed was forged: And upon that the Lord *Popham* at the ſame time put this caſe, If one ſay to me, take heed how you entertain or receive *A. B.* for he hath committed ſuch a Felony, and I giving no credit to the report receive the party, where in truth he had committed the Felony, now I am acceſſary to this Felony. To which the Lord Keeper anſwered, that he would not draw blood upon ſuch an opinion.

Notice of truſt.

Notice of Forgery.

Notice of Felony.

68.

Reservation of Rent. IF a man make a Leaſe reſerving Rent to the Leſſor, if he ſay no more, the Rent ſhall goe but to the Leſſor; but if it be reſerved generally, and doe not ſay to whom, it ſhall goe as well to the Heir of the Leſſor, as to the Leſſor himſelf. *Per Gawdy.*

69.

Hue and Cry. IT was ſayd by *Fell*, an Attorney of the Kings-bench, that it hath been adjudged in the ſame Court, that an Action upon the Statute of Hue and Cry againſt Inhabitants of any Hundred, will never lye by Bill, but ought to be ſued by Writ, and the reaſon is, for that the Action is brought againſt Inhabitants, which are a multitude, and for that may not be *in cuſtodia Mareſcalli*, as another private perſon may.

70.

Capias after a Fieri facias executed for parcell. A Judgement was had in an Action of Debt of 80 l. And the Plaintif had a *Fieri facias*, and the Sherif levyed 20 l. of the goods of the Defendant, and returned that of Record, but *non conſtat* by the Record whether the Plaintif had received the 20 l. or not, and the Plaintif took forth a *Cap. ad ſatisfaciend.* for the whole Execution, being 80 l. and upon that the Defendant was Utlawed; and now he brought a Writ of Error to reverſe that Utlary, which was reverſed, for that it did appear upon Record that execution was made by *Fieri fac.* of 20 l. of the 80 l. and therefore the *Cap. ad ſatisfaciend.* ſhould have been but 60 l.

71.

Claim of Dower. IF the Husband ſell his land by Fine, with Proclamations, and live five years, and after dye, his Wife being ſole, of full age, of ſound memory, out of priſon, and within the four Seas, and doe not make any demand, or claim of her Dower within five years after the death of her Husband, ſhe ſhall be barred.

72.

Moities in Tail. A Feofment was made before the Statute of 27. to the uſe of a Man and Woman unmarried, and of the Heires of their two bodies begotten, and after they intermarried, and after marriage the Husband bargained and ſold all the land in fee, to one of his Feoffees

offees, and died without iſſue, and after the Statute of 27 was made the Wife claymed the whole by Survivor as Tenant in tayl after poſſibility of iſſue extinct. And by the opinion of all the Court without argument ſhe can have but the Moity, becauſe the Husband and Wife had Moities as Joyntenants, by reaſon of the Joyntenancy made before marriage, And yet by the Court as to the iſſue in tail if any had beeen, he ſhall have a Formdon of the whole.

73.

IF Land be holden of a Subject, and the Tenant ſells the land by Fine, with Proclamations, to *I. S.* in tail, the Remainder to her Majeſty in fee, The Tenant in tail dyes his Iſſue within age, The Opinion of the Court was that the Iſſue ſhall not be in ward to the Subject if the Queen do not aſſent to her Remainder, for that the tenure and ſervices are gone and extinct by the Fee ſimple to the Queen, which may hold of none. And ſo the iſſue in tail ſhall be in ward to none.

Tenure and Wardſhip extinct.

74.

IF a man have goods to the value of 100l. and is indebted in 20l. and he deviſeth and bequeatheth to his Wife by his Teſtament the moity of all his goods to be equally divided between her and his Executors, and make his Executors, and dieth, And the Executors pay the 20l. yet the Wife ſhall have the moity of the whole eſtate, *viz.* 50l. without any defalcation, ſo that the Executors have Aſſets beſides.

Legacy of a moity of all his goods.

75.

IN a Prohibition and the Caſe was this, the Farmor of a Parſonage ſued in he Spirituall Court for Tithes of Saffron againſt a Vicar; The Vicar pleaded that time out of memory of man, the Vicar and his predeceſſors have had the Tithe of all Saffron growing within the pariſh. The Plaintif pleaded that the land, where the Saffron was growing this year, by the ſpace of 40 yeares next before had been ſown with Corn, whereof the Parſon and his predeceſſors have had the Tithe. And the Spirituall Court would not allow this Plea. For which the partie prayed a Prohibition. *Tanfield*] The right of the Tithe commeth in queſtion between the Parſon and Vicar, Howbeit that the Farmor be made partie to the ſuit, and for that the right of Tithes being in queſtion between two Spirituall men, This Court hath no Jurisdiction. And this very point was adjudged

Benefield *againſt* Feek. *Tithe of Saffron.* *A Prohibition for the Plaintif in the Spirituall Court upon his own libell.* *Suit between perſons ſpirituall.*

36. *Eliz. inter Hunt* and *Bush*, in this Court, that in such case the partie shall have a consultation. *Popham*] The one of the parties is a man temporall, and so was it not in your case. *Sic nota*, that by the Spirituall law, the Vicar shall have Tithes of Saffron of land newly sown with Saffron, albeithat before the Parson had the Tith of that land being sowen with Corn.

76.

Oyer of a deed.

NOta, that by the course of the Kings-bench a man may have *Oyer* of the deed after imparlance, but not in the Common place. *Q.*

77.

Devise before purchase.

Cro. El. 493. Moor. 404. 1. Ro. 618.

BEckford brought an *ejectione firme* against *Parnecote*, and the Case upon the speciall Verdict was found to be this, That one *Parsons* was seised of certain land in *A.* and had issue four Daughters, *viz. Barbera, Johan, E.* and *Mary*, and made his Will in writing, And by the same Will, he devised all his land in *Aldworth* to *Barbera* and *Johan* two of his daughters, and made them two his Executors, and after he purchased other land in *Aldworth*, and a stranger was desirous to purchase this land of him newly purchased, And he said that that land should goe with the residue of his land to his Executors, as his other land should go; After the said Testator made a Codicill and caused it to be annexed to his Will, But the Codicill was of other things, and mentioned nothing of this land, and whether this new purchased land shall pass by the Will, without new publication of the Will for this land, was the question. *Moor*] I think that the land newly purchased shall pass, and to prove that he said, that the reason in *Bretts* case 340. Com. for which land newly purchased shall not pass, is by reason that there is no manner of new publication, but in our case there is new publication, and in *Trivillians* case 4 *M.* 143. where *cestui quæ use* made a Will, And then the Statute of 27 *H.* 8. of uses came, now this Will was comptrouled, but by a new publication it may be made good, and he cited 44. *E.* 3. 12. and 44 *Ass.* 36. *Atkinsonè contra.* For this Will ought to be warranted by the Statute, otherwise it is not good, and the Statute doth not enable him which hath no land at the time of the devise, to devise land, and the words of the Statute manifest this, which are, Where any person or persons having any land, holden *&c.* So by the express words, if he have no lands at the time of the Devise, he may not Devise, as appears plainly in *Brets* case, allso it appears that words out of a Will, will never make that to pass which was intended before,

The Statute of Wills.

Want of apt words.

fore, and with that agreeth the Lord *Cheney* his caſe, and the caſe of *Downhall* and *Catesby* lately adjudged, and in this caſe, allbeit the Teſtator allowed this Will after to be his Will, yet this ſhall never make this land newly purchaſed to paſs without expreſs publication of this land. *Clinch* Juſtice ſayd, it ſeemed to him that the land newly purchaſed ſhall paſs; for after that he had made his laſt purchaſe, the Teſtator heard the Will read, and by that he deviſed all his lands in *Aldworth*, and then knew that the land newly purchaſed lay in *Aldworth*, and upon reading of the Will he allowed it, and ſo I think that the new purchaſed land ſhall paſs as well as the other, and that this allowance upon the reading is a new publication. *Gawdy* Juſtice *è contra*] For if I make my Will, and by that deviſe all my land in *Dale*, and after I purchaſe other land there, and one afterwards ſhews me the Will, and demands of me if it ſhall be my Will, and I anſwer, it ſhall, I ſay that this land newly purchaſed ſhall not paſs; and in this caſe howbeit that the reading of the Teſtament, or annexing of the Codicill be a new publication, yet it doth not manifeſt the intent to be that more ſhall paſs by that than he intended at the firſt; and allſo the new reading of the Will, aud the annexing of the Codicill may not properly be termed a new publication as this caſe is; for here was not any Controlment, and for that the Will needs not any new publication, by which it ſeemeth that without any expreſs publication for this land newly purchaſed, this land ſhall not paſs; for the things which are found to be done are but allowances, and no new publications.

Things not expreſſed in the Wil muſt be expreſſed in the publication.

Hearing and allowance is a publication.

Where there it no controlment there needeth no new publication.

78.

H*Arecourt* brought a Writ of Error upon a Judgment given in the Common-place, and aſſigned for Error for that the Judgement was that the now Defendant ſhould recover xx l. aſſeſſed to him *per Jur. nec non* x l. aſſeſſed to him *hic per Jur.* where it ought to be *per Cur. Yelverton* prayed that it might be amended, for that the Record in the Common-place was right, and the Miſpriſion which made this Error was in the Clerk which certified the Record; and the opinion of the Conrt was, that if it were ſo, it ſhould be amended; and therefore they ſayd they would have the Record it ſelf brought out of the Common-place thither to be viewed whether it were ſo or not. *Worley* Clerk] The Juſtices of the Common-place will not ſuffer the Record to be brought hither. *Popham*] That is no new Preſident that the Record ſhall be brought hither; for I have ſeen it done before this time: But after in truth the Juſtices of the Common-place would not ſend their Record into the Kings-bench; and therefore *Cook* the Queens Attorney prayed that it might be amended.

Amendment

The Record it ſelf ſhall not be ſent out of the Court.

ed. *Popham*] It may not be amended, for that I have ſpoken with the Juſtices of the Common place, and they ſay, that the Record was at the firſt as it was certified, *viz. Iur. pro. Cur.* and after the Record was certified, it was amended by a Clerk without any Warrant. *Cook*] Allbeit that it was ſo, yet under Correction it is amendable, for it is the miſpriſion but of a Clerk, and that of a Letter onely, *viz.* of *I.* for this letter *C.* for the word is written *Jur.* ſhort, where it ought to have been *Cur*, and ſo amendable by the Statute of 8 *Hen.* 6. *Curia è contra*, for it is parcell of the Judgement, and you never ſaw the Judgement of the Court amended, for which it cannot be amended here.

No amendment in Joint of Judgement.

79.

Trover.

EAſt Executor of *I. S.* brought an Action upon the caſe of finding and Converting of certain goods, againſt *Newman*, And upon not guilty pleaded, the Jury found this ſpeciall Verdict, *viz.* That the Teſtator was poſſeſſed of divers goods, and them loſt, and the Defendant found them, And knowing them to be the goods of the Teſtator upon demand denied to deliver them, And if this deniall was a Converſion they prayed the diſcretion of the Court. *Fenner*] I think that the deniall is a Converſion; for when I loſe my goods, and they come to your hands by finding, and you deny to deliver them to me, I ſhall have an Action of Treſpaſs againſt you, as 33. *Hen.* 6. is. And the very keeping of goods by an Executor ſhall be counted as an Adminiſtration; and by the ſame reaſon, the deniall here ſhall be counted a Converſion. *Gawdy*] I am of the ſame opinion, for by 2 of *Hen.* 7. if I deliver to you Cloth to keep, and you keep it negligently, I ſhall have detinue or an Action upon the caſe, at my pleaſure, and by 20 *Hen.* 7. if a Baker contract for Corn, and the party do not deliver it at the day, the party may have Debt or an Action of the caſe. *Tanfield*] There was a caſe in this Court, 30 *Eliz.* for the finding and Converſion of a horſe. But here was no requeſt made by the Plaintif to deliver the horſe; For which Judgement was given againſt the Plaintif. *Curia*] This is not like our caſe, for the requeſt and deniall makes all the wrong in this caſe. *& Adjornatur.*

Denial is a Converſion.

Keeping is an Adminiſtration.

80.

Limitation.

WIſeman brought a Writ of Error againſt *Baldwin*, upon a Judgement given in Treſpaſs in the Common place upon a ſpeciall Verdict, which was, that *Baldwin* was ſeiſed of 24 Acres of Land, and made his Will, and by the ſame deviſed his ſaid Land

Land to *Henry* his youngeſt Sonne when he ſhould accompliſh the age of 24 years, upon Condition, that he ſhould pay 20. l. to the Daughter of the Deviſor; And if he ſhall happen to dye before his age of 24 years, then he willed that *Richard* his eldeſt Sonne ſhall have the ſame Land, upon Condition, that he ſhould pay to the ſaid Daughter 20. l. And he willed further by the ſaid Will, that if both his Sonnes failed of payment of the ſaid 20. l. to his Daughter, that the ſaid Land ſhould remain to his Daughter. And after this Deviſor died, and *Henry* his younger Son entred after the age of 24 years, and did not pay the ſaid 20. l. to the Daughter, and *Richard* the eldeſt Son did enter upon him; and whether his entry were lawfull or not was the queſtion. *Cook* Attorney ſaid, it was a meer Limitation, and no Condition, and by conſequence the entry of the eldeſt Sonne is not lawfull, and to prove that he cited a Caſe which he ſaid was in Juſtice *Dalliſons* reports 9 *Eliz.* where a man deviſed Land to his youngeſt Son, upon Condition of payment of a certain ſum of money to his Daughter, as our caſe is, The Remainder over to another of his youngeſt Sonns, and the firſt Deviſee entred, and did not pay the money; and he in Remainder took advantage of that, and ſo in our caſe, by the Deviſe *Richard* is to have nothing, if *Henry* the youngeſt Son did not die before 24 yeares, and the intent of the Deviſor appears that his Daughter ſhall have the Land for *non* payment of the money; And therefore if the Heir enter for the Condition broken he deſtroies the whole intent of the Deviſor; And therefore the entry of the eldeſt Son is not lawfull. *Godfery*] I think it is a meer Condition, for ſo are the words. And then when the word ſubſequent, limit a Remainder to the Daughter for default of payment, that is not good, and he denyed the caſe cited out of Juſtice *Dalliſon*, for he ſaid he was dead long before *An.* 9 *Eliz.* *Gawdy*] I take the caſe of 29 *Hen.* 8. 33. to be a Limitation, and no Condition, for there a man deviſed to the Prior and Covent of St. *Bartholomewes, Ita quod reddant decano & capitulo ſancti Pauli* 16. l. *per An.* And if they failed of paiment, that their eſtate ſhould ceaſe, and that the Land ſhould Remain to the ſaid Dean and Chapter, and their Succeſſors. And it ſeemeth there, that the Dean and Chapter for *non* payment ſhall not enter; But I think the contrary, and I think in this caſe it is a Limitation and no Condition. *Fenner*] If I make a Leaſe for life upon Condition, with Remainder over, may my Heir enter for the Condition broken? *Godfry*] Yes Sir. *Fenner*] Nay truly, for then he ſhall defeat the Remainder, which is well limited by me before, the which I may not do, and this is the reaſon; If I make a Leaſe for life upon Condition, and after grant the Reverſion over, that before the eſtate the Condition was gone, for that, if I reenter I ſhall defeat my own grant. *Gawdy*] *Per* 29. *Aſſ.* If a man deviſe

A remainder and a recovery may be created by one deed.

to one upon Condition, that if he ſhall be a Chaplin, to remain over to a Corporation, and the Tenant was made Chaplin, by which the Heir entred, and an Aſſiſe was adjudged maintainable againſt him, for his entry was not lawfull. *Clinch*] The intent of the Deviſor appears, that for default of payment, the Daughter ſhall have the Land, and therefore the Sonne ſhall not enter. And *Wilcocks* caſe in this Court, was, that a man ſeiſed of a Copyhold in the nature of Burrough Engliſh, ſurrendred that to the uſe of his Will, and by his Will deviſed the Land to his eldeſt Sonne, upon Condition that he ſhould pay to the youngeſt Sonne x. l. And after for *non* payment the youngeſt Sonne entred, and his entry was adjudged lawfull. *Gawdy*] Wee three are agreed, that it is a Limitation and no Condition, by which the firſt Judgement was reverſed.

81.

Aſſumpſit of the teſtator.

PYne of *Lincolns* Inne brought an *Aſſumpſit* againſt Widow *Hide* as Executrix of her Husband, and declared, that the Teſtator in Conſideration that the Plaintif had leaſed to him certain Copyhold-land, he aſſumed to pay to him 100. l. And the Defendant demurred in Law, for that the Action is not maintainable againſt any Executor upon an Aſſumption of the Teſtator. *Popham*] For the Contrariety of opinion in this Caſe between the Judges of the Common-place and us, we will make it an Exchequer-Chamber caſe, and ſo try the Law.

82.

Prohibition for a Parſons leaſe.

ONe *Jackſon* prayed a Prohibition, and ſhewed for his Cauſe, that the Parſon ſued him in the ſpirituall Court for tithes, And howt the Statute of 13 *El.* cap. 20. *&c.* That if any Parſon make a Leaſe for years of his Parſonage, and abſent himſelf by the ſpace of 80 daies, that the Leaſe ſhall be void, And the Parſon ſhall forfeit the profits of his benefice for a year, and the Statute of 14 *Eliz.* cap. 11. *&c.* That all bonds and Covenants for ſuffering or permiting any Parſon to enjoy any Benefice, or to take any Benefice, or to take the profits and fruits thereof ſhall be adjudged of ſuch force and Validity, as Leaſes made by the ſame perſons of benefices and not otherwiſe, and after the Statute of 18 *Eliz.* cap. 11. *&c.* appoints, that the Ordinary after complaint made, and ſentence given againſt any ſuch incumbent, whereby he ought or ſhall loſe one years profits of his Benefice, ſhall grant Sequeſtration to one of the inhabitants of the ſame Pariſh, as he ſhall think meet; And upon default therein by the Ordinary, that it may and ſhall be lawfull to every Pariſhoner where

where the Benefice is, to retein, and keep his or their tithes, and likewise for the Church-wardens to enter and take the profits of the Glebe lands, and other Rents and duties of every such Benefice, to be imployed to the use of the poor, and he shewed how that the Parson made a Covenant and a Bond, that he would permit *I. S.* to take the profits of his Benefice for a year, And whether this were such a Lease, for which the Parson ought to forfeit the profits, *ut super*, he prayed the opinion of the Court, and it seemed to them it is not; the reason seemeth to be, because he doth not aver him to be absent above 80 daies in the same year.

83.

Conversion. Folio 20. Co. 4. 243.

PEr *Popham*] If a man find my horse, and after ride him, and then delivers the horse unto me, and I bring an Action of Trover for the Conversion, It is no plea that you have delivered the horse to me before the Action brought, for you ought to answer to the Conversion.

84.

Abatement of debt.

CHesson brought an *assumpsit* against *D. K.* and declared that where *I. S.* was indebted to him in 64l. The Defendant in consideration that the Plaintif would abate 10l. parcell of the said Debt, and also would give day to the said *I. S.* untill *Michaelmas* then next following for payment of the said 54 l. residue, That the next day after she the said Defendant would become bound to the now Party for the payment of the said 54.l. at the said Feast of St. *Michael*, and the Plaintiff *in facto* saith, that he hath abated 10. l. parcell of the said 64. l. and yet the Defendant did not become bounden for the payment of the said 54. l. residue, *per quod actio accrevit*. The Defendant pleaded in Barre, That after the said day given, and before *Michaelmas*, *scil. tali die*, the Planitiff entred a plaint in *London*, for the Debt aforesaid of 64. l. and then caused the said *I. S.* to be arrested, and demanded judgement, *si actio. Tanfield*] The Declaration is sufficient, for you have delared, that you have abated part of the debt, but you have not shewed how that was defaulked, and therefore not good, for we may take issue upon that if we will; and if a man be bound in an Obligation, to discharge me of certaine rent, it is no plea for him to say, that he hath me discharged, without shewing how; for that, that I may take issue upon that. Also to the second matter, the Plaintiff ought not onely to give day of payment, but also to forbeare to molest *I. S.* untill the day be come. *Cook* to

Arrest before the day given for payment.

 the

the contrary, And as to the first poiut it seemeth, that the discharge ought to be upon the entring into bond; for, if a man make a Contract for 10. l. and after enter into bond for 5 l. parcell of that, all the Contract is gone, as appears *per* 3. *H.* 4. And as to the second point, I think the promise is broken by the Defendant, for that he did not enter into Bond the next day after the assumption made. *Gawdie*] I doubt whether the Declaration be good or not; for, it seems to me that the Plaintiff ought to shew how he hath defaulked the 10. l. part of the 64. l. for, it may not be intended a defaulking in Law, but of a defaulking indeed, and for that it is not like the case cited in 3. *H.* 4. But the Plaintiff ought to doe an Act himselfe, And 17. *Eliz.* A man was bound to allow, ratifie, and confirm a term for yeers, And it is no Plea to say that he hath that confirmed, But he ought to shew how, because every Confirmation must be by Deed; but if the Declaration were good, then perchance the Barre would not be good: And howbeit that Mr. Attorney hath said, that there is a breach for not entring into Bond, yet the Plaintiff may not sue, if he have not performed his promise. *Fenner*] It will be hard to make the Declaration good; for, when one promiseth to defaulk his debt, this shall be intended a lawfull discharge, which cannot be otherwise than by writing, and *per* 20. *E.* 3. Accompt. If a man be bound to acknowledge a Statute, and he doth acknowledge the same, but yet keeps the same in his own hands, this is no performance. And as to the second point, when one promiseth, in consideration of one thing to doe another, there ought to be performance of the first, as if a man be bound to make a new Pale, as 9. *Edw.* 4. 20. & 15. *Edw.* 4. 2. 3. is, having the old pale for his labour, there if the old pale be taken from him, he is not bound to make the new pale. *Popham*] I am of the same opinion.

Bond for parcell of a contract.

Every discharge to be by writing.

For the intent must also be performed.

Disturbance of the consideration.

85.

Assumpsit in consideration that a man will voluntarily do that act which otherwise he should have been compelled to doe.

DIxon brought an Action upon the case against *Adams*, and declared that whereas *I. S.* was indebted to the said *Adams* in 60. l. forwhich the said *Adams* arrested the said *I. S.* and the said *Dixon* was bail for the said *I.S.* in the said suit, and the said *Adams* recovered in the said suit, and after sued forth a *Scire facias* against the said *Dixon* being bail, wherupon the said *Adams*, in consideration that the said *Dixon* would pay him the 60. l. the said *Adams* assumed to assigne over unto him the said first Obligation, in which the said *I. S.* was bound unto him, and upon which the first action was brought, and the judgement thereupon had, and the Plaintiff *dixit in facto* that he had paid the 60. l. to the Defendant, *Sed prædictus defend. promissionem*,

promiſſionem & aſſumptionem ſuas minime curans, hath not aſſigned over to the Plantiff the ſaid Obligation and Judgement, *per quod act. accrevit*, and Judgement was given for the Plaintiff, for the conſideration was holden good.

86.

Limitation.

ROſſe brought an *Ejectione firme* againſt *Thomas Ardwick*, and the caſe was ſuch, that one *Norwood* was ſeiſed in fee, and leaſed to one *Nicholas Ardwick* and his Aſſignes for his own life, and for the lives of *Thomas*, *Andrew*, and *John Ardwick*, and after *Norwood* the Leſſor leaſed the Reverſion to *Roſſe* the now Plaintif for 21 years, and after *Nicholas Ardwick* made a leaſe of the ſame land to *Thomas Ardwick* to hold at will, and dyed; and if the eſtate of *Tho.* was determined by the death of *Nich.* was the queſtion. *Johnſon*] There are two points in the caſe; the firſt, if by this word Aſſignee an Occupant ſhall have the land, and I think he ſhall not: And the ſecond point is when a leaſe is made to one, and his Aſſignees, for his own life, and the lives of two others, if now his own life confound the other two lives, for that that it is greater to the Leſſee than the other two lives, and he ſaid the Leſſee hath no eſtate but for his own life, and when he dyed the ſtate is determined; and to prove that he cited the opinion of *Knightley* in 28 *Hen.* 8. 10. Where he ſaith if a leaſe be made to one *pur auter vie*, without impeachment of Waſt, the remainder to him for his own life, that now he is puniſhable of Waſt, for that, that when the remainder is limited unto him for his own life, this drowneth the eſtate *pur auter vie*, which was in him before. And by 3 *Edw.* 3. If a leaſe be made to two for their lives without impeachment of Waſt, and one of them purchaſe the Fee ſimple, and dye, now his heir ſhall have Waſt againſt the Survivor. And I have heard that this was the caſe of the Lord *Aburgaveney* for a houſe in *Warwick* lane. *Cook è contra* And the caſe is no more but that a leaſe is made to one and his Aſſignes for his own life, and for the lives of two others; and I think that all may ſtand together; for a man may have an eſtate for his own life, the remainder for yeares, and both may ſtand together in him *ſimul & ſemel*; for that, that albeit that the Leſſee may not have that during his own life, yet he may diſpoſe of that, and by that means ſhall have the benefit, and ſo in this caſe, and alſo an eſtate *pur auter vie* ſhall be in *eſſe* in the Leſſee for the benefit of the Occupant, and the inconvenienties ſhall be exceeding many in this caſe, if the eſtate doth not endure for all their lifes, for the Statute of 32 *H.* 8. inableth Tenant in tayl to make leaſes for 3 lives or 21 years, and uſually Tenants in tayl make ſuch leaſes as theſe be, and for that the generality of the caſe ought greatly

Waſt againſt the ſurviving Joyntenant.

Remainder for years to the tenant for life.

ly to be regarded; and there was a case adjudged in the Common place between *Chambers* and *Gostock*, where a lease was made to two for their lives, and the life of a stranger, and one of the Lessees dyed, and the Survivor granted the land for his life, and the life of the stranger, and it was no forfeiture; and allso it was *Burdels* case in the Common-place, 32 *Eliz.* where a lease was to him for his own life, and the lives of two others, and a good lease for all their lives: And for the point of the Occupant there is no question but that the state of him that first enters is better than the state of him that enters under the state of the Lessor. *Gawdy*] The cases put by Mr. *Johnson* are not like to the case in question, and I will agree them; for here the greater estate precedeth the lesser; I hold that a lease made to one for his life, the remainder to him for anothers life, is good, for he may it grant over; and so I think in this case, that so long as any of the lives remain living, that the estate remains. *Fenner*] I am of the same opinion, for I think that the state *pur auter vies* is in the party to dispose at his pleasure; so Judgment was given for the Defendant.

Chambers against Gostock.

Burdels case.

Occupant.

The greater estate preceding the less, both may stand.

87.

Visne.

Harding brought an Action of Trover of goods against *Sherman*, and declared of a Trover at *D.* in the County of *Hunt.* The Defendant pleaded that he bought the goods of one *I. S.* at *Roiston*, in the County of *Hertford* in open Market, and demanded Judgement; The Plaintif replied that the Defendant bought the same goods of the said *I. S.* at *D.* aforesaid in the County of *Huntington* by fraud and Covin, And after bought them again at *Roiston*, as the Defendant supposeth; the Defendant rejoines, that he bought the same goods *bona fide* at *Roiston*, *Absq*; *hoc* that he bought them by fraud, *apud D.* in *Com. Hunt. Glanvile* pleaded in arrest of Judgement, that the Visne ought to be of both Counties. *Gawdy* seemeth to agree, but for that that *Clinch* and *Fenner* held strongly that the Visne was well awarded in one of the Counties, therefore *Gawdy* gave Judgement for the Plaintif, for by this speciall Traverse the buying at *Roiston* shall not come in question

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88.

Keep harmless.

Payton being High-Sherif, brought Debt upon an Obligation against his under-Sherif; and the Condition was to perform all Covenants in a pair of Indentures conteined, and one Covenant was, that the under-sherif shall keep all the Prisoners committed to him, untill they be delivered by the Law, and allso to save Mr. *Payton*

ton harmleſs of all eſcapes made by the ſaid Priſoners. And the Defendant pleaded performance of all Covenants. *Godfry*] The Plea is not good, for one part is in the Affirmative, and the other in the Negative. By which the Defendant ought to plead, that the Plaintif *non fuit damnificatus*, and ſo was the opinion of the Court; by which day was given to the Defendant to amend his plea.

89.

A Man brought an Action of Treſpaſs, for entring into an houſe, and breaking of his cloſe in *Dale*; The Defendaut ſaid, that the ſaid houſe and cloſe in which the Treſpaſs is ſuppoſed to be done, conteins twenty Acres, and is, & at the time of the Treſpaſs ſuppoſed, was his Freehold. And the Plaintif replyed, *quod locus & clauſa in quo ſupponitur tranſgreſſio, eſt unum meſſuagium*, and makes him a Title to it. To which the Defendant pleaded *non Cul.* And it was found for the Plaintif, and for that that the Plaintif by his Replication made to him Title but to a meſſuage, and doth not maintain his Declaration which was for the meſſuage and the cloſe; therefore it was awarded *quod querens nihil capiat per Billam, ſed quære*, if this do not amonut to a diſcontiuuance of the cloſe onely, and ſo helped by the Verdict.

Variance between the declaration and the new aſſignment, or the title of the Plaintif.

90.

Thomas Allen brought a Writ of Debt againſt *William Abraham*, upon an Obligation bearing date in *October*. The Condition, was, that whereas the ſayd *Thomas Allen*, at the requeſt of the above bounden *William Abraham*, ſtandeth bound together with the ſayd *William* unto one *J. S.* in an Obligation for the true payment of 11. l. the 15. day of *May* (the which *May* was before the date of the ſayd Obligation whereof the Action is brought) if the ſaid *W. A.* do ſave and keep harmleſs the ſayd *T. A.* of and from the ſaid Obligation, that then, *&c.* The Defendant pleaded payment *ſecundum formam & effectum conditionis prædictæ*, and upon this Plea the Plaintif demurred in Law, and Judgement given for the Plaintif, for the Defendant ought to plead *non damnificatus*.

Counterbond for an Obligation allready forfeited.

91.

Huntley brought a Writ of Accompt againſt *Griffith*, and the caſe was, that one deviſed a certain ſum of money to a Feme covert, And the Husband and Wife made a Letter of Attorney to the Defendant to receive the ſame money of the Executor, who did receive it ac-

Account. Baron & Feme

accordingly to the use of the woman, And the Husband and Wife both dye, and the Administrator of the Womans Husband brings this Action. *Tanfeild* argued that the Action is not maintainable, for when the Legacy was devised to the woman, the Husband and Wife ought to joyn in the Action, and if the Wife dye, the Husband hath no remedy. And when the Husband and the Wife make a Letter of Attorney to receive the money, this principally is to be sayd the act of the woman, and the Husband joyneth with her but for conformity, and for that it appears in 19 *Eliz.* 354. if Baron and Feme levy a Fine of the Wives land, and the Wife onely declares the use of the Fine, it is good; and by 16 *Ed.* 4. 8. If a man be a Receiver to a woman sole, which afterwards takes a Husband, and he and his Wife assign Auditors to the Receiver, they both shall joyn in an Action of Debt for the Arrerages. *Altam è contra*, and sayd that the concourse of all our Books are, that when money is delivered to deliver over to another, that other shall have an Action of Accompt, allbeit that before that time he had not any property; And 6 *Ed.* 3. 1. that proveth. *Gawdy*] It seems to me the Action is well brought, for the matter whereupon you stand is the Letter of Attorney, and I say if the Husband sole had made the Letter of Attorney, it had been well enough; and when the money is received to the use of the Husband and the Wife, now by that the Husband hath interest. *Popham*] I am of the same opinion; for if Debt be due to a woman sole upon an Obligation, and after she take an Husband, and the Husband sole makes a Letter of Attorney to *J. S.* to receive that, and *J. S.* receives the same, now the Husband sole shall have an accompt against *J. S.* *Fenner accord.* so Judgement was given for the Plaintif.

Letter of Attorney by the Husband only. Debt due to a Feme sole.

For by the entermartage the duty became the husbands, if he could attain it in the life of the wife, which he did by the receipt of his Bayly.

92.

Verdict in a Scire fac. upon Recognisance.

Cro. El. 506. Moor. 429.

THe Lady *Gresham* brought a *Scire facias* upon a Recognisance against *William Man* as *terr. Tenant.* The Defendant pleaded in abatement of the Writ, that one *Bedingfield* was seised in Fee of three Acres of land not named, Judgement, *si execut. &c.* And the issue was if the aforesaid three Acres of land were the land of the aforesaid *Bedingfeild* or not, and the Jury found that *B.* and *J. S.* were Jointenants of the said three Acres, and whether this Verdict hath found for the Plaintif or Defendant was the question. *Gawdy*] I think it may never be said the Land of *Bedngfield* onely. And to prove that he vouched 28 *Hen.* 8. *Dyer* 32. in debt for Rent, the Plaintif declared of a demise of 26 Acres rendring the said Rent; The Defendant pleaded that the Plaintif demised to him 26 Acres, and 4 Acres more, without that that he demised the twenty Acres onely, And the Jury found

Whether Joyntenancy shal be sayd a Seisin.

found that he Leaſed but 22 Acres, and there that was good, for the Defendant hath confeſſed a demiſe of 26 Acres, and then the Verdict ſhould have been, that the 4 Acres *ultra* were not demiſed; and alſo he ſaid, when two men made a Feoffment, the Feoffee ſhall be in by both, the which is a ſtrong proof, that the one ſole is not ſeiſed. *Fenner*] According to the matter in queſtion, I think it is found for the Plaintif, for the pretence of the Defendant is, to have a companion, againſt whom the *Scire facias* ſhall be as well brought as againſt himſelf. And in 46. *Edw.* 3. That in *caſu proviſo*, if iſſue be taken upon an Alienation in Fee, and the Jury find an Alienation *pro Termino vitæ*, this is a Verdict good enough, and the Plaintif ſhall recover, for the Alienation to the Defendants Inheritance is the queſtion. And whether it be in Fee or for life, it is but form, and ſo in this caſe. *Popham*] by pleading of the truth the Defendant might have been holpen, but not as he hath pleaded here; as if one plead his Freehold, and another ſay his Freehold *abſq; hoc* that it is the Freehold of the Plaintif, and upon that, they are at iſſue, And the Verdict finds that the Plaintif and Defendant are Tenants in Common, Now this Verdict is found for the Plaintif; for he that makes the firſt lie ſhall be triced, and this was the Defendant. *Fenner*] In this caſe, one Tenant may not have an Action againſt an other, and it was agreed in this caſe, if there are two Jointenants, and the one make a Statute, and after joines with his companion in a Feoffment of that Land, now the moity of the Land may be extended upon this Statute. *Godfry*] When it appears unto the Court, that there is another againſt whom the extent ſhall be, then the Plaintif his Writ ſhall abate. *Gawdy*] No truly, for by 44 *Edw.* 3. if a Writ of Dower be brought againſt the iſſue in tail which is remitted, and the Defendant plead *ne unques ſeiſi que Dower*, and the Verdict find the remitter, yet the Plaintif ſhall have the Judgement, for the Tenant if he will have advantage of that ought to plead it.

Forfeiture by alienation.

Iointenants make a ſtatute.

93.

THe Parſon of *Rameſey* ſued in the ſpirituall Court for Tithes of Aſp, and a Prohibition was awarded. And *Fenner* ſaid that it was adjudged before that time that Aſp ſhould not pay Tithes, and alſo it was agreed if a man cut trees for Housboot, Hedgeboot, Ploughboot, Cartboot, and Fireboot, Tithes ſhall not be paid of them.

Prohibition for Aſp.

No Tithes for housboots &c. or other uſuall bootes.

94.

NOta *per Fenner* Juſtice, that an Action of accompt ſhall be maintainable againſt a ſervant but not againſt an Apprentice.

Account.

95.

Depravation upon endictment.

Home was indicted for that he had ſpoken againſt the book of Common prayer. *Yelverton*] The Indictment as it appears is taken before the Lord *Anderſon* and Baron *Gent*, Juſtices of the Gaol delivery, and hath not ſhewed that they are Juſtices of Oyer and Terminer, *nec de Aſſize*, as the Statute appointeth, and for that it is void, Alſo the Indictment is *quod recuſavit uti communi precatione et Adminiſtrare ſacramenta*, and doth not ſay appointed by the book of common prayer, alſo the Defendant was twiſe indicted, and upon the ſecond Indictment the Judgement was given before the ſaid Juſtices, that he ſhould be deprived of his benefice, and this is a Spirituall act, the which the Temporall Judges have not to deal withall. *Fenner*] I doubt whether they may give Judgment of deprivation, albeit the Statute ſay that the Offendor ſhall be deprived *ipſo facto*, no more than the Statute of 5. *Ed.* 6. which ſaith that for the ſtriking in the Church the Offender ſhall be excommunicated *ipſo facto*. Alſo it doth not appear whether the Defendant be Curate of the pariſh where he refuſed to ſay divine ſervice or not, and if he be not, then his refuſall is not puniſhable by the Statute.

96.

Diſſeiſim.

Cook Attorney generall demanded this queſtion of the Court, if there be Diſſeiſor and Diſſeiſee, and during the Diſſeiſin the Diſſeiſee when he hath nothing but a right, levies a fine to a ſtranger; If by this fine the right of the Diſſeiſee be gone, and if the Diſſeiſor ſhall take advantage of that. *Popham* and *Gawdy*] Nay truly.

97.

Qualification and non reſidence.

1 point.

2 point.

3 point adjudged.

Robins brought an *ejectione firme* againſt *Prince*, and upon the ſpeciall Verdict Mr. *Francis Moor* arguing for the Plaintif did obſerve three points in the caſe, The firſt was, when a Chaplin which is beneficed above the value of 8l. is admitted and inſtituted into another benefice, and before induction gets a qualification, and after is inducted, If now the benefice which he had firſt, be void, for that, that the qualification comes between the Admiſſion and the induction. The ſecond point is, when the diſpenſation is entred in the Chancery in a paper book, and not enrolled in parchment, If this be a ſufficient enrollment, for that that the uſuall manner of inrollments is in parchment. And the third point was, when a Parſon is inhibited by the Arch-Biſhop that he ſhall not intermeddle with the benefice, by meanes whereof the Parſon is abſent by the ſpace of

lxxx daies, If ſuch abſence ſhall make a leaſe made by the Parſon void. And as to the laſt point all the Judges agreed, that ſuch abſence doth not make the leaſe void: For it muſt be a voluntary abſence, for ſuch an abſence the Statute doth intend, and this abſence is by reaſon of an inhibition. And the caſe was argued for the other ſide by Mr. *Crook*, but I could not hear him, and the next Term it was argued again by Mr. *Tanfield* for the Plaintif, and he ſaid that the principall point of the caſe is whether the firſt benefice be void, inſomuch that the incumbent hath gotten a qualification before induction into the ſecond benefice And I think the firſt is void, for the intent of the Statute was that the cure might be well ſerved, and that poor people might be well relieved. And as no man may ſerve two maſters, ſo no man may ſerve two cures, and before induction the Church is full, and the Parſon hath *Curam Animarum*, and is *rector Eccleſiæ* before induction; and if a gift be made to ſuch a Parſon before induction it is good; and ſo if he alien by conſent of the Patron and Ordinary it is good. And if the grantee of the next Preſentation preſent a Clerk that is admitted and inſtituted, and dyes before induction, yet the graunt of the grantee is executed, and he ſhall not preſent again. And ſo it was adjudged in *Colſills* caſe *M.* 10. & 17. *Eliz. Rot.* 4. And the wordes of the Statute of 22. *H.* 8. cap. 13. are, that every Dutcheſs, Marqueſs, Counteſs, and Baroneſs, being Widowes, may have two Chaplins, whereof every one of them may purchaſe licence or diſpenſation to receive have and keep two benefices, with care of Souls, And before induction he *recipit, habuit & cuſtodivit* two benefices, and then he was not qualified, So the firſt was void; and as to the point of the enrollment it is clear, there ought to be a parchment roll, for that was the meaning of the law, and not to make an entry in the paper book. *Lawton contra*, for all the body of the act of 22. *H.* 8. extendeth to the poſſeſſion of the benefice, and the Proviſoe ought to be conſtrued acccording to the body of the act, and before induction he doth not offend the law, and therefore the diſpenſation which comes before the induction comes in good time, for if the Kings Tenant make a Feoffment, and Letter of Attorney to make Livery and ſeizin, this is no offence, for if he after purchaſe a Licence of Alienation, and then Livery and ſeiſin is made, this Licence is good. *Gawdy*] Before induction the firſt Benefice is not void. And you ſhall find 2 & 3 *Mar.* 130. that iſſue was taken upon the induction; but a Common perſon may not change his preſentment after admiſſion and before induction, and Plenarty is a good plea againſt a Common perſon in ſuch a caſe; But yet before induction he is not a full Parſon to all intents, for a grant of an Annuity before induction is not good, *Com.* 526. for the induction makes it notorious that he is Parſon; then when he after his admiſſion

Parſon before induction.

Preſentation executed before induction.

Colchils *caſe death of the preſentee before induction. a point.*

Licence of alienation.

Plenarty againſt a common perſon.

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Licence of alienation.

Plenarty againſt a common perſon.

The Commencement of the fault.

miſſion gets a qualification, it ſeems to me that the qualification ſhall not help him: for the Commencement of the fault was before the qualification, and the Induction after relates to the admiſſion, and to prove that he cited 1 *Mar.* 99. where a man bought beaſts out of the Market, and gave 5. ſ. to have election to have the refuſall in the Market the next day, and in the Market he agreed to have the beaſts, and paid Toll, and holden clearly that this ſhall relate to the contract out of the Market (ſo in this caſe) Allſo here the words are, ſhall take, receive, and have (after qualification) two Benefices. And before the induction he takes the benefices, in this caſe, for before the induction, and at the time of admiſſion, the Ordinary ſaid to him, *Accipe curam tuam & meam.* And if a Parſon be once qualified, and after take a ſecond Benefice, and then his Maſter dies, yet his qualification remaines, ſo is it if he depart from the ſervice of his Maſter. Then for the ſecond point for the enrollment, it ſeemeth it is good, for that it hath been allwaies ſo uſed. For the Statute which ſaith, a man arraigned of Treaſon ſhall be tried by people of like condition; yet if an Eſquire be arraigned of Treaſon, he ſhall be tried by people of meaner condition, as appears by 1 *Mar.* 99. for that it hath been allwaies put in ure, and therefore ſhall be intended that it was the meaning of the Law. *Fenner Contra*] For before induction the Incumbent hath no intereſt in the Parſonage, and the Pariſhoners have no notice of him, and he may not ſerve the Cure before Induction, and then if our Law do not repute him Parſon, then the Statute doth not intend to make the firſt Benefice void, before that he is full Parſon in another Benefice. Allſo this word (have) in the Statute, is a word Poſſeſſory, and ought to be full to all entents. *Popham*] I think the diſpenſation will not help, for by the Admiſſion as to the Cure of ſouls he is a full Parſon, and allſo ſuch a Parſon is a ſufficient Parſon as to the Patron, and to deveſt the intereſt into the Parſon. Allſo he is a full Parſon as to a ſtranger, for if 7 years incurr between the Admiſſion and inſtitution before Induction, no Laps ſhall acrew; But as to the matter of the poſſeſſion and fruits of the Benefice, he is not Parſon before Induction. And if the Law no not make the firſt Benefice void in ſuch a caſe, then one Parſon may retain 20 Benefices together, for firſt he may be admitted into one, & before Induction into that, admitted into another, *& ſic in infinitum*, the which was never the meaning of the makers of the Law, and if before the Statute of 21 *Hen.* 8. a man had taken two Benefices, that had not been good without a *perinde valere* in the ſpirituall Law, and the meaning of the Law was, to help one that was a Chaplin to Noble men, and not ſuch which are hunting Chaplins which hunt after Benefices.

Death or departure after qualification and taking another benefice.

No laps forr want of induction.

No taking of fruits before induction.

Hunting Chaplins.

Then to the ſecond matter, I think the enrollment is good, and

but.

but an offence in the Clerk which is finable, and not in the party, for the party may not procure the Clerk to make his entry in an another course than the custom is, And therefore no fault in the party.

At another day in *Mich.* 39 & 40 *Eliz.* this case was moved again, and *Cook* Attorney seemed that the dispensation which comes after Admission and Institution, and before Induction, comes to late, and is not holpen by the Proviso of the Statute of 21 *Hen.* 8. for the words of the Statute are, shall have, retein, and take a second Benefice. And after admission and institution he may not take his Benefice, the which he had before, for he is Parson to make a plenarty, and to many other purposes, before Induction. *Gawdy* seemed that the admission and Institution made him full Incumbent, as to the Patron and to the Parson himself, But as to the possession of the Church he is not full Parson before Induction, for 5 *Eliz.* in an issue upon plenarty, it is there taken, that the Church is *plena & consulta per admissionem & institutionem* before Induction. And if any other construction shall be made in this case, the Letter of the Law shall not be observed, *viz.* shall have, receive, and keep, for he may not have a thing the which he had before. And it seemes to me, that neither by the intent nor by the Letter of the Statute it is holpen. *Fenner ècontra*] For 14 *Eliz. fuit* adjudged upon an issue, *Prebend.* or not *Prebend.* that before Induction he was not *Prebend.* But the reason for which a *Quare impedit* doth not lie after the Admission and Institution after six months, is for that, that against ervey Patron, the Presentation is onely excepted, and before Induction the Parson if he will, may refuse a Benefice, for a Parson which is absent, may be presented and admitted to a Benefice; and if he may not refuse it, it is very mischievous to him. And the Presentation is the Act of the Patron, and the Admission is the Act of the Ordinary, But the Induction is the Act of the Parson himself, for by that he is known to all his Parishoners, and his free consent by that is testified to accept of the Benefice to which he was presented. *Gawdy*] If I grant to you *prox. præsentationem*, and the Incumbent die, and the grantee present one which after admission and Institution dies before Induction, whether is the grant executed or not, *quasi diceret quod sit. Fenner*] I have asked the opinion of the Judges of our house, and they are of my opinion. But I agree with my Brother *Gawdy* for his last opinion, for after admission and Institution, the Church is full against himself before Induction. *Gawdy* Truly it is full against all Common Persons. *Clinch*] The Induction is like to a livery of seisin, and therefore before the Induction, the Parson is as a Feoffee is after a Deed of Feoffment delivered unto him, and before livery and seisin he is but Tenant at Will. *Popham*] I agree with my Brother *Gawdy*, for if the spirituall Law be well understood, it will make an end of this mat-

Refusall before induction.

A Parson absent may be presented and admitted.

Plenarty against himself before induction.

A ſentence declaratory upon a deprivation ipſo facto.

ter and caſe. For by their Law, if a man take two Benefices, the one is void, *ipſo facto*, without deprivation; Yet there ought to be a ſentence declaratory of the deprivation, to give notice to our Law, and by the admiſſion and inſtitution, the incumbent is a parſon to many purpoſes, but not to all profits, but as to the exerciſing of his Function he is Parſon, and hath *Curam animarum*, and if by the admiſſion and inſtitution before induction, the preſentee ſhall not be perfect Parſon, great inconvenience will enſue, for put that a man grant *prox. præſentationem* to one, and he preſent, and his preſentee is admitted and inſtituted, and then the preſentee obtaines of the Biſhop a ſequeſtration of the profits, and will never be inducted, in this caſe the grantor may loſe his patronage. And if I bargain and ſell my land, and before enrollment of the deed I purchaſe a licence of the Queen, this licence ſhall not avail, for he ought to have a pardon, and ſo in this caſe. *Gawdie*] I am not of the ſame opinion of my Lord chief Juſtice that if a man that hath a benefice take another benefice that that is void before deprivation by the ſpirituall law: For under correction their law is otherwiſe; this caſe is now reported by *Cook*, and adjudged that the diſpenſation came to late.

So it ſeemeth upon an execution.

He may exerciſe his Function before induction.

66.

Scire facias ſur recogn.

HOO Executor of *Hoo* brought a *Scire facias* againſt *Felix Marſhall*, and the caſe was this, *Hoo* the Teſtator commenced a ſuit in the Kings-bench againſt one *Fuller*, And the ſaid *Felix Marſhall* became Bail for the ſaid *Fuller* in the ſaid ſuit, *Scilicet*, That if the ſaid *Fuller* ſhould be condemned in that Action, and did not either pay that condemnation, or yield his body to priſon, that then *Felix Marſhall* ſhould pay the condemnation for him, according to the ordinary courſe of Bailes. But yet in pleading of this Recogniſance he ſaid further *Et ſi defecerit in ſolutione tunc vult & concedit quod prædictum debitum levietur de terris et tenementis ſuis.* And *Gawdy* Juſtice ſaid he did not uſe any ſuch wordes when he took Bail. And after this Bail taken, and before Judgement given in the ſaid ſuit, the ſaid *Hoo* the Teſtator releaſed to the ſaid *Marſhall* all actions and demands, And after, Judgement was given for the ſaid *Hoo* the Teſtator, againſt *Fuller*, and thereupon the Teſtator brought a *Scire facias* againſt *M.* as appears before, and *M.* pleaded the ſaid releaſe, and hanging this Plea, *Hoo* the Teſtator dyed, and then the Executors brought another *Scire facias* againſt the ſaid *M.* And he pleaded this releaſe again in barr. *Gawdy*] I doubt of the caſe, for 5 *Eliz.* 217. the Covenantee releaſed all actions, ſuits, quarrels, debts, executions, and treſpaſſes, and this was before any Covenant broken. And it is there holden

Learning for releaſes.

holden that it is no barr to an action of Covenant afterwards brought upon a Covenant after broken, And *per.* 4. *Ed.* 440. If a Grantee of an Annuity releaſe all actions to the Grantor before the day of payment, this will diſcharge the arrearages before accrued, but not thoſe payments after. And by *Read* and *Bullocks* Caſe a releaſe is not available to any other right or action, than ſuch as a man hath at the time of the releaſe, for it is againſt the nature of a releaſe to take effect *in tempore futuro*, and in the caſe in queſtion there was no action nor demand before judgement given againſt *Fuller*. And I doubt of the caſe cited in 27 *H.* 6. 7. where an Obligation is delivered as an eſcrowl, and the Obligee releaſe to the Obligor all actions & after the Obligation is delivered as the deed of the party, whether this releaſe do that diſcharge or not, it ſhall not by *P.* 5. *H.* 7. fo. 27. So there are many other caſes there put, as if an Infant deliver a deed as an Eſcrowl to be delivered as his deed when he comes of full age, There I take the Law clear, that if the condition be performed at ful age of the Infant, yet this is not his deed. And ſo of a Feme Covert which delivers a deed as an Eſcrowl to be delivered upon Condition when ſhe is ſole, if after the deed be delivered when the Woman is ſole, yet this is not her deed, for in theſe two laſt caſes the firſt act which was the delivery as an Eſcrowl was meerly void. And if a man be indicted by conſpiracy, and after releaſe to the conſpirators all actions, and after that the party indicted is arraigned upon this Indictment, and by Triall is acquitted, I doubt whether this releaſe ſhall barr him in an action of conſpiracy, or not. *Fenner* ſaid that the Recogniſance is immediatly a Debt, and for that this releaſe ſhall be a Barr, for by *Lytt.* a releaſe of all actions is no bar in a *fieri fac.* to have executio within the year, but in a *Scire fac.* after the year it is a good bar, and ſo in this caſe it is a barr, which was not a bar at the firſt. And I ſee not any reaſon for which if the King releaſe a Recogniſance which is not yet broken, it ſhould not be a diſcharge of the Recogniſance, Except it be for that, that the generall words in the Kings grant ſhall not extend to diſcharge ſuch a Recogniſance without ſpeciall words. And I think that a deed which is delivered as an Eſcrowl is not a deed, but onely after the delivery of that as a deed, and ſhall not relate to be a deed *ab initio*. And for that, a releaſe made before the delivery as a deed, albeit that after that it is delivered as an Eſcrowl ſhall not diſcharge it. *Paſ.* 5. *H.* 7. 27.

Annuity.

Read *againſt* Bullock.

Difference where the firſt delivery is void and where not.

Infant.

Feme covert.

Releaſe after delivery is an Eſcrowl.

Clinch] I think that this releaſe ſhall be a good barr, for if the Defendant at the time when he entered bail had had his land, and had ſold it afore the Judgement given againſt *Fuller* for whom he was bail, none will deny but that this land ſhall be lyable, which proves that this is a Recogniſance and a Debt immediately. *Popham*] This is a prettie caſe, but there will be a difference between a duty upon a con-

Duties absolute continuent, differece.

Obligation to perform covenants discharged, but not the covenant.

A possibility cannot be discharged or surrendred.

Release of demand. actions, difference.

contingent, and a duty absolute, for if I covenant to enfeoff you of the mannor of *Dale* before such a day, and bind my self by Obligation to perform the covenants, and before the day you release to me all actions, there the Obligation is discharged, but not the Covenant for the Obligation was an absolute duty, and the Covenant but contingent; and it seemeth that a deed delivered as an Escrowl may not be discharged by release made before that the Escrowl be delivered as a deed. And in the case at bar there is no duty but upon a Contingent, that is to say if the party be condemned and do not satisfie the Debt, nor render his body to prison. And for that before that it become a duty, such a release will never be a discharge, being but a possibility, for it hath been adjudged, that where a lease hath been made to two for their lives, the Remainder, which shall first happen to dye, for forty yeares, that neither the one, nor the other nor both together may grant this term of 40. yeares before it be setled, & if I release all demands before that the rent is due, the rent is gone. But it is otherwise of a release of all actions. *Gawdie*] I agree that a release of all demands will discharge rent due. *Popham*] If I make a lease to *I. S.* for so many yeares as *I. K.* shall name, this *I. S.* may not surrender his term before that *I. K.* name the yeares. And he denyed that the land of *Marshall* the manucaptor which he had at the time of the Bayl should be bound being sold before the Judgement against *Fuller*, as Justice *Clinch* did affirm in his argument. *Fenner*] There is a difference between an Action and an Interest. And after Judgement was given that the release was no bar.

99.

Necessary apparrell.

Ackerell brought an *Assumpsit* against *Bachelor*, and declared, that in consideration that the Plaintif did deliver unto the Defendant divers Suits of Apparell, that is to say, a Sattin Dublet and Hose, with silver and gold lace; and one velvet Jerkin and Hose, and one fustian Dublet and cloth Hose to his own proper use, the Defendant promised to pay to the Plaintif forty pound when he should be required. The Defendant pleaded, that *tempore assumptionis*, he was within age, and the Plaintif replyed, that at the same time the sayd Defendant was servant and attending upon the Earl of *Essex* in his chamber, and that this Apparel was delivered unto him for his necessary apparel during the said time of his said service; and upon that the Defendant demurred, and the Court caused the Declaration to be read openly in Court to see of what degree the Defendant was of his Addition, and upon reading of the Record it appeared by the Declaration, that the Defendant was there written Gentleman, for which the Court agreed clearly, that Sattin with gold

gold and silver lace, or Jerkin or Hose of Velvet, are not necessary Apparel for a Gentleman; and so an Infant is not bound to pay for such Apparell; and therefore the Action for so much will not lye; but for the residue, to wit, for the Dublet of fustian, and Hose of cloth, it seemeth the Action is well maintainable, for the prices of every of them is set down severally in the Declaration. *Popham*] The Plaintif in his Declaration hath confessed he is satisfied of part of his contract, but *non constat* for what part of the clothes the mony received was payd, that is, whether for the necessary, or unnecessary. *Gawdy*] Truly it shall be intended for the necessary Apparel.

Several prises good in a declar.

Satisf. of parcel

100.

Goodale brought an Information against one *Butler*, upon the Statute of 21 *Hen.* 8. *cap.* 13. for not being resident upon his Benefice whereof he was Parson, by the space of six moneths, for which the Defendant ought to forfeit for every moneths absence 10 *l.* And it was found by speciall Verdict, that the Defendant had demised his Parsonage-house to another, excepting one chamber for himself, And within the same Parish had hired another house, and there kept Hospitality, and was allwaies dwelling there, And whether this be a Non-residence within the Statute, for that he doth not dwel within the Parsonage-house, but inhabiteth within the Parish in another house, is the question. *Clinch & Fenner* were of opinion, that if he be resident within his Parish, albeit he doth not dwel within the Parsonage-house, that yet this is a sufficient residence within the Statute; for the Glebe land, and other profits within the Parish makes the Benefice, for a Benefice is derived of this word *Beneficium*, the which is a profit, or a commodity, and if he be resident in any part of his Parish, he may well enough execute all the Functions Spirituall, and Temporall, and keep Hospitality to relieve his Parishioners; and these were the chiefest points that the makers of the Statute intended to provide for. And *Fenner* sayd, the Proviso helpeth not; and that the words of the Statute are, That every Spirituall person ought to be resident at, in, or upon his Benefice, in the disjunctive; and if that be performed in any of those points, then that sufficeth. But if the words were, that he shall be resident upon his Benefice, there peradventure he ought to dwell in the Parsonage-house onely. *Popham* and *Gawdy* to the contrary; For Residence is a commorancy, and where he hath his Tithes, that is a profit; but yet it is no Benefice intended by the Statute; for when the Statute saith that he shall be resident upon his Benefice, this shall be expounded upon the Parsonage-house; for the Statute may not be so unreasonably construed, that only will compel the Parson to be resident in

Non-residence.

Beneficium.

Proviso.

Cont. per Popham 68.

any other place of the Pariſh, than where he hath his houſe. And for that *Colthurſt*, and *Beniſhins* caſe in the Comment 20. *Le Prior* of *Bath* was ſeiſed of a Grange or Farm, called *Barton*, near *Bath*, in Fee, and he and the Covent leaſed that by Deed indented to *H. B.* and to his Wife for life, the remainder to *W. B.* their Son, for his life, *ſi ipſe inhabitare vellet & reſidens eſſe omnino de & ſuper prædict. Grangium.* And if it ſhall be intended in this caſe that the Leſſee may be reſident upon any other place than in the Grange-houſe, then by poſſibility the intent of the Leſſor might be defeated utterly, which was, that the Grange-houſe ſhould be repaired. Allſo a reaſon that moved the makers of the Statute to be of opinion to make the Parſons reſident, was, for that by this means the Parſonage-houſe ſhould be well kept in reparations, and ſhould not be left to the ſucceſſor in Delapidations. And the Proviſo in the end of the Statute will not help the matter; for the Proviſo is, that it ſhall be lawfull for any Spirituall perſon to take to farm any Manſion-houſe, having but an Orchard or Garden, in any City, Burrough, or Town; ſo that by that they have no liberty of Non-reſidence by colour of the ſayd Proviſo. And *Popham* ſayd, if a man be Non-reſident by compulſion, that is not within the Law: And if a Parſon purchaſe a parcell of Land within his Pariſh, and dwell upon that he purchaſed, and leaſe out his Parſonage-houſe, this is a means to make the Parſonage-houſe to come to deſtruction, and ruin.

Reparations.

Proviſo.

Abſence compulſary.

Three things provided for by the Statute.

And the meaning of the Law-makers was, to provide for three things. For Hoſpitality; for Divine ſervice; and to prevent Delapidations; and ſo in this caſe the Defendant is within the penalty of the Statute. And to that my brother *Fenner* hath ſayd, That theſe words, in, at, or upon, will make a difference, truly that is not ſo, for thoſe words are all of one ſubſtance in this caſe. *Et adjornatur.*

101.

Fieri facias executed, but not returned.

NOta that in a *Scire fac.* between *Foe* and *Balton* of the County of *Norfolk* it was holden by *Popham* and *Gawdy*, and not denyed by any, if a *Fieri fac.* goe forth to a Sherif, and he levy the Debt of the goods of the Defendant, but doth not retorn his Writ, if the Plaintif after ſue another *Scire fac.* againſt the Defendant, upon the Judgement, he may plead this matter, and the Plaintif ſhall be put to his remedy againſt the Sherif; for the ſale of the Defendants goods by the Sherif is good, and not to be defeated; and ſo is a good Plea in bar of the other Execution, otherwiſe the Defendant ſhall be put to a great miſchief, *vide* 20 *Hen.* 6. 24. & 29. & 19 *Edw.* 3. *Sci-*

re

re facias, & 44 *E.* 3. 18. *Quære* if he ſhall not have an *audita querela*, If the Plaintif take out a new *Scire facias* within the year.

102.

NOta *per* Mr. *Cook* Attorney generall, that he ſaid in an argument in the Exchequer, if a Biſhop with conſent of the Dean and Chapter, alien land belonging to his Biſhoprick in fee, that a *contra formam collocationis* doth not lye, and ſo he ſaid he could ſhew the reſolution of all the Judges of England, the reaſon is, for that, that the Statute of *Weſtm.* 2 cap. 41. whereupon this is founded, ſpeakes only of Abbots, Priors, or Maſters of Hoſpitalls, and albeit there are other words general, to wit or Maſters of other Religious or Eccleſiaſticall houſes, yet that doth not extend to Biſhops, which is an higher diginity than an Abbot, but the generall words after ought to be ſupplied with intention of other houſes inferior to thoſe named before. So hath it been ruled, that a Leaſe by a Biſhop is out of the Statute of 13 *Eliz.* cap. 10. which commenceth with Dean and Chapter, howbeit there are generall words after, to wit; or any other having any Spirituall or Eccleſiaſticall living, which is intended of any other inferior to thoſe named before, and never was intended to extend to ſuperiors, but as I think the contrary hath been ſince adjudged.

Alienation by a Biſhop.

103.

VPon an Evidence in an *Ejectione firme* by *Cootes* againſt *Atkinſon* for land in the County of *Derby*, It appeared that a Leaſe for yeares was made of the ſaid land, 20. *H.* 8. for 80. yeares, and after the Leſſee was ouſted and died inteſtate, And after in 4. and 5. *P. & Mar.* a Fine was levied of the ſaid land with Proclamations, and the Conuſee enjoyed it untill 37. *Eliz.* in which year letters of Adminiſtration of the goods of the Leſſee was granted to *I. S.* which entered and made the Leaſe to the Plaintif. *Godfrey* moved that this Fine with non claim for five yeares ſhall bind the right of the term by the Statute of 4. *H.* 7. which hath a ſaving of title and intereſts, So as they make their claim within five yeares, otherwiſe their title and intereſt is bound. *Cook* and *Tanfield*] A right of a term is not within the Statute of 4 *H.* 7. but right of Free-hold or inheritance, and ſo it was agreed in *Stamfords* caſe 21 *Eliz.* and ſure hath been diverſe times holden. *Godfrey*] *Stamfords* caſe was a leaſe to commence at a day future, and then a Fine and non claim for 5 yeares before the day of the commencement ſhall not bind the right of that Leaſe, but a Fine levied after the day of commencement, although be-

Whether a leaſe be bound by the Statute of 4 H. 7.

A good diſtinction.

fore any entry of the Leſſee, ſhall bind. *Saffins* caſe. *Gawdy & Fenner abſent. cæter. Juſtic.* held that a Leaſe for yeares ſhall never be bound by the Statute of 4 *H.* 7. and therefore the Adminiſtrator may lawfully enter. This was the Title of the Counteſs of *Shrewsbury* againſt *Rowland Ayre* for the mannor of *Haſſop in Com. prædict.* But the Jury gave a ſpeciall Verdict, and Juſtice *Fenner* the next day ſaid that he demanded this queſtion of the Lord *Anderſon.*

And he is clear of opinion that the Statute of 4 *H.* 7. extends to bind a right of a term if the Leſſee were or might have been ever in poſſeſſion before the Fine.

104.

Slander. POllard and his Wife brought an Action upon the caſe againſt *Armſhaw* for theſe words, Thou art a whore, for *I. S.* Goldſmith hath the uſe of thy body, the cart is too good for thee. *Popham, et tota Curia* The Action will not lye, for the Common law cannot define who is a Whore, but if one keep a victualling houſe or Inne, and *A Victualing houſe.* one ſay that ſhe keeps a houſe of Bawdry, an action lyes, and ſo was *Ann Davies* caſe, becauſe it may be a meanes to make honeſt gueſts to forbear the houſe, and ſo breed a temporall loſs to the owner.

105.

Inquiſition upon an elegit. INter *Palmer & Humphrey*, the caſe was ſuch, upon an *Elegit* a Sherif impannelled an Inqueſt, which found that one *Henry Fry* againſt whom the *Elegit* was taken out was poſſeſſed of a Leaſe for 100. yeares to begin at the Feaſt of St. *Mich. Anno* 2 & 3. *P. & M.* when in truth (as it was found by ſpeciall verdict in this action) the Leaſe was to begin at the Feaſt of St. *Mich. Anno* 3. & 4. *Phi. & Ma. Cujus quidem Henrici Fry Statum intereſſe & terminum in ten. præ. (& ne dit prædict.) Juratores prædict. appreciaverunt* to 80. l. and the Sheriff ſold the Leaſe as a chattell for lxxx. l. The queſtion was, if the ſale by the Sheriff be a good ſale. *Popham*] It ſeems to me the ſale is good, for albeit the Leaſe is miſrecited, and *Henery Fry* hath not any ſuch Leaſe, yet when the Jury comes to praiſe it, and the Sherif to ſell his eſtate in the land, they do not referr that to the recitall before, but generally that they ſhall ſell all the ſtate, intereſt, and term of *Henry Fry*. But if this word (*prædict.*) had been in the inquiſition & ſale it had been otherwiſe, as if the Sherif had ſaid all which ſaid eſtate & term, then he had referred that to the recitall before, which being falſe will make the ſale void, & for that he ſaid that it was agreed in the time of Sr. *Chriſtopher Wray* about 21 yeares paſt, between Sr. *G. Sydnam* and *Rolls* upon a *Fieri facias*, where the

Inqueſt

Inqueſt found, that the party againſt whom, &c. was poſſeſſed of a certain term bearing date, &c. which did not bear ſuch date, and the Sherif ſold the ſayd term And it was ruled that the ſale was not good; But the Court did then adviſe the party to take a new *Fieri fac.* and that the Inqueſt ſhould find generally that he was poſſeſſed of a term for years yet enduring, and the Sherif upon that made ſale accordingly, and that ſale was holden good, for that the Extendors and Sherif could not come to the knowledge of the certainty of the term; ſo in the principall caſe, the ſale being of a term, and the ſtate of the party in the Tenements, and not of the term and eſtate aforeſayd, which was falſly recited, this is a good ſale, which was in a manner agred by all the Juſtices; but *adjornatur.* At another day *Tanfeild* moved this caſe again. *Popham*] I have conſidered of the Record with adviſe, and I think as this caſe is, that the ſale of a term by an *Elegit* is voyd; and for that the difference between a *Fieri fac.* and an *Elegit* is to be conſidered: For the *Elegit* is, that *per Inquiſitionem & ſacramentum 12 bonorum hominum per rationabile precium & extent.* the Sherif ſhould appriſe the goods and chattels, and extend the land; ſo without inquiry the Sherif may not ſell, *quod fuit conceſſum*, as *primo Mar.* 100 is. Then if the Sherif inquire of one term, and ſell another, as our caſe is, the term ſold was never found by our Inquiſition, and for that the ſale not good, *quod Fenner conceſſit*, yet the Lord *Popham* ſayd, that if it had been found by the Inquiſition generally, that he is poſſeſſed of ſuch land for term of divers years, *adhuc ventur.* which they have priſed to ſuch a ſum, this had been good, inſomuch as they have not any means to come to the knowledge of the certainty of the term, But when by Inquiry a Term in particular is found, they may not vary from that, and ſell another; and he ſayd that theſe words, *Cujus ſtatum Henrici Fry* ſhall be referred as well to the ſtate precedent found, as to the perſon of *Fry.* And ſo is the common intendment in pleading of a *que eſtate.* And he ſaid to Mr. *Tanfield*, that if he had taken any note of their firſt opinions, that he ſhould raze that out of his Book again; and after the parties agreed in Court, that *Hauger* ſhould give to *Fry* 200 Marks more for his term, and then *Fry* ſhould make aſſurance to him of the term, for confirmation of the ſale.

A good form of finding a term by inquiſition.

The difference between a Fieri fac. *and an* Elegit.

Que eſtate, refers as well to the eſtate as to the perſon.

106.

NOta *per Cook* Attorney Generall. If a man Covenant in conſideration of naturall love to his ſon, to ſtand ſeiſed of certain Land to the uſe of himſelf for life, the Remainder to the ſame ſon in Fee, with a Proviſo, that it ſhall be lawfull for himſelf to make

Difference between Feoffment to an uſe, and covenant to raiſe an uſe.

Leaſes for 21 years or three lives. Now he may not make ſuch Leaſes, notwithſtanding this Proviſo being by way of Covenant to raiſe the uſe. And ſo it hath been reſolved. *Contra*] Peradventure if it were by way of Feoffment to uſes. After Mr. *Walter* ſaid, that now lately in one *Sharingtons* caſe, it was adjudged in this Court upon a Writ of Error, That if a man Covenant with his Eldeſt ſon in conſideration of naturall love, to ſtand ſeiſed to the uſe of himſelf for life, the remainder to his Eldeſt Son in tail, with Proviſo, that he himſelf might make Leaſes to his ſecond ſon, or to any other of his kindred for 21 years or 3 lives, and he made Leaſes to him accordingly, this was holden good; for they to whom the Leaſes are made, are within the conſideration, to wit of the blood, and for that, the uſe may well riſe to maintain thoſe Leaſes; But if the Proviſo had been to make Leaſes to any man, howbeit, that after he made Leaſes by force of that to his ſecond ſon, Theſe Leaſes are void, for they are not within the conſideration of the Covenant by Intendment of Law at the firſt, for the Law at the beginning adjudged the Proviſo meerly void, *quod nota.*

A proviſo with ſpeciall limitation good.

107.

Counterbond.

Uſury.

Robinſon brought Debt upon an Obligation againſt *May*, the Condition was, that the Defendant ſhould diſcharge or ſave harmleſs the Plaintif of an Obligation, for which the Plaintif as ſurety with the now Defendant was bound to *I. S.* The Defendant by way of bar pleaded, that the Obligation made to *I. S.* by him, and the Plaintif, was upon a corrupt and uſurious bargain, and pleaded the Statute of Uſury, and concluded *& ſic non dammificatus.* It was moved at the bar, that this was no plea, for the Condition is, that the Defendant ſhall diſcharge or ſave harmleſs, *&c.* And the Plaintif was impleaded by *I. S.* for that debt, and hath paid the condemnation. *Tanfield Contra*] For if this ſhall not be allowed for a good plea, the Statute of uſury will be utterly defeated. For by a compact between the ſurety and the Uſurer, the ſurety ſhall pay the uſurer, and the ſurety by that counterbond ſhall have double recompence againſt the Principall, which will be miſchievous. But the whole Court held the plea not good. *ſed quare.*

108.

Audita querela, for a ſpeciall bail.

Hobbs ſued an *Audita querela* in the Kings Bench againſt *Tedcaſtle*, and upon a demurer, the caſe was recited by *Moor* of the Temple, to be this, *Tedcaſtle* ſued a bill of debt in this Court, againſt one *Hallaway*, *in Cuſtodia Mareſcali*, which found bail, the

ſaid

ſaid *Hobbs*, and an another, which entred bail according to the common courſe of bail, And after *Hallaway* was condemned in the ſaid Action, and then the ſaid *Hallaway* died without paying the condemnation, or rendring his body to Priſon, for which a *ſcire facias* was ſued againſt the bail, and upon two *nihils* retorned, Execution, was awarded againſt them; Whereupon they ſued this *Andita querela*, ſuppoſing that the death of *Hallaway* hath diſcharged the bail. *Moor* argued for the Plaintif, that the bail ought to be diſcharged upon the matter, for *Hallaway* had Election to diſcharge the bail by paying the condemnation, or rendring of his body to Priſon; Now by the Act of God it becomes impoſſible to perform the one, to wit, to yield his body to priſon, And therefore the Law will diſcharge him of the other, and by conſequence his bail. And that he proved by *Arundells* caſe, 9 *Eliz.* 262. & 6. & 7 *Eliz.* 231. Sir *Edw. Walgraves* caſe. *Popham*] *Quomodo conſtat* here but that there was convenient time after the Judgement, to perform the one or the other. *Kemp* Secondary] The courſe is allwaies here, after Judgement to award a *Capias* againſt the Defendant, and if upon that he do not render himſelf, or pay the condemnation, then to ſue Execution againſt the bail, and not before; but here there was never any *Capias* awarded againſt *Hallaway* the Defendant in his life time. *Popham Gawdy & Fenner*] This ſeemeth very reaſonable, not to ſue Execution againſt the bail, untill a default be retorned againſt the Principall, and the recogniſance of the bail, which is, that the Principall ſhall yield himſelf, *&c.* is intended to be upon Proceſs awarded againſt: him But no Proceſs was awarded againſt him in his life; and now it is impoſſible that he ſhould yield himſelf to Priſon being dead, and therefore the bail is diſcharged. And ſo they awarded Judgement for the Plaintif in the *Andita querela*. *Judgement.*

109.

Matures brought an Action of Covenant againſt *Weſtwood*. And the caſe was ſuch, *Adams* Leſſee for 20 years, made a Leaſe for 10 years of the ſame Land to *Bowes* by indenture, whereby *Bowes* did Covenant at the end of his Term of ten years, to avoid and to leave peaceable poſſeſſion to *Adams*, his Executors or Aſſignes; *Adams* granted over his Reverſion to *Matures* the now Plaintif. The queſtion is, if the Plaintif by the Statute of 32 *Hen.* 8. cap 34. as Aſſignee may maintain an Action of Covenant for this Covenant broken, or not. *Nota*, that this caſe was moved divers times; And firſt it was moved, if a Grantee of a Reverſion for years be within the Statute or not. *Gawdy*] Well enough: For the words of the Statute extend to that (*quod fuit conceſſum*) Then it was moved that this was a *Covenant. for an aſſignee of a reverſion for years.*

meer

meer collaterall Covenant between the persons, and not concerning the estate of the land, and for that not within the Statute. *Popham* sayd, If nothing be sayd to the contrary, *intretur Judicium* for the Plaintiff; afterwards the case was moved again. *Gawdie*] It seems the case is, Assigne, which in regard of his reversion, as of a Covenant, may well maintain this action by the Statute of 32. *Fenner*] This Covenant is not any Covenant to be performed, during the estate or terme of the Defendant, but it is a Covenant to doe a thing in the end of his term, and for that is not a Covenant, of which the Assignee of the reversion shall have benefit by the Statute, for that he hath not any reversion depending upon any estate, when the Covenant is alledged to be broken; for the Defendant when he breaks that Covenant, is but Tenant at sufferance. *Gawdie contra*, the Covenant is not to doe a thing after the terme determined, but at the instant of the determination of the term, and therfore it is a Covenant annexed to the State, and runnes with the Land, and therefore the Plaintiff shall have advantage over it.

Covenant reall which concerneth the estate.

110.

A Child born living but bruised.

TRespasse and assault was brought against one *Sims* by the Husband and the Wife for beating of the woman. *Cook*, the case is such, as appears by examination, A man beats a woman which is great with child, and after the child is born living, but hath signes, and bruises in his body, received by the said batterie, and after dyed thereof, I say that this is murder. *Fenner & Popham, absentibus ceteris*, cleerly of the same opinion, and the difference is where the child is born dead, and where it is born living, for if it be dead born it is no murder, for *non constat*, whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appeare in his body, and then he dye, the Batteror shal be arraigned of murder, for now it may be proved whether these wounds were the cause of the death or not, and for that if it be found, he shall be condemned.

111.

Mortgage.

GOodale against *Wyat* in trepasse. The speciall verdict found that Sr *John Paggiuton* was seised of the land in question in Fee, and morgaged it to one *Woodliff* upon condition, that if he or his Heires did pay to the Heires, Executors, or Administrators of the said *W.* within one yeer after the death of the said *Woodliff* 50 l. That then the said deed of Feoffment, and the Seisin thereupon given, should be void, and afterwards *Woodliff* infeoffed *Goodale* of the same land

land, and gave notice of the ſaid Feoffment, to Sr. *J. P.* and after *Woodliff* dyed, and Sir *J.* agreed with the heir of *W.* to wit, one *Drew Woodliff*, to take 30 l. for the ſaid 50 l. but when the 30 l. was to be paid, Sir *J.* paid to the ſaid *Drew VV.* all the fifty pounds, and after ſuch payment made, *Drew VV.* gave back to the ſaid Sr. *J.* 20 l. parcel of the 50 l. *Altam*] 2. points are in the caſe. The firſt is to whom the payment of the money, as this caſe is, ought to be made, and I think to the Feoffee, becauſe the Heir hath nothing to do in the land, and to prove that he cited *fundamenta legum*, 17. Aſſ. 2. 6. R. 2. *Pleſingtons* caſe, and the caſe of one *Ramſey* 19. *Eliz.* was ſuch, a man infeoffed three, upon condition, that if the Feoffor paid to them or their heires 100 l. that then he might re-enter, and after one of the Feoffees dyed, and the Feoffor tendred the money to his Heir, and adjudged a void tender, : And alſo *Littleton* proves that; but t if the condition might be performed, to the Heir by payment, that ought to be preciſely performed, for he is now as a ſtranger, having nothing in the land, and the Covin between the Feoffor and the Heir, muſt not hurt my Client, for by 4. *E.* 2. *cui in vita* 22. If *cui in vita* be brought againſt a Prior, and hanging the action, he is depoſed by Covin, this ſhal not abate the Writ, and it was adjudged in this Court, where a man was bound by Obligation to deliver a bond, and after he got a judgement upon it, and then delivered the bond, and holden no performance of the condition, becauſe the intent was not performed; and 20. *E.* 3. accompt 29. in accompt the Defendant pleaded a Deed, whereby the Plaintiff granted that if the Defendant made a Recogniſance to him, that then the Writ of accompt ſhall be made void, and he ſhewed how he made a Recogniſance, But the Plaintiff ſaid that after the making and before deliverie of that to him, the Defendant took it from the Clerk, and therefore was adjudged to accompt, and by 18. *E.* 4. 20. If a man be bound to licenſe another to carrie a 100. Oakes, if he do licenſe him, and then diſturb him, the condition is broken; and the common caſe of Executors will prove this; for, if an Executor have but 20 l. aſſets in his hands, and is in debt to two men, in 20. l. to either of them; if he pay but 10 l. to the one, and have an acquittance of him, for the whole debt of 20 l. yet the other 10 l. that remains in his hands ſhall be aſſets to the other; for no compacting between ſtrangers ſhall prejudice my right, *per que &c. Gawdy*] I think cleerly, if the payment had been intirely made to the Heir, without colluſion, it had been good, for that he is preiſely named, for none will deny but that if the payment had been made to the Executors, it had been good, but the Covin between the Heir and the Feoffor peradventure will make no payment; and for that 34. *E.* 1. Warrantie 88. If the father infeoff the Son, to the intent that this land ſhall not be aſſets to the Sonne, to bar him in a Formdone, this Co-

Ramſeys caſe.

Compoſition by Executors. Preciſely named.

Payment upon a morgage good to the Executorrs cleerly

Father enfeoff the ſon.

Covin by administration.

vin will not ſerve to aid him, and 2 & 3 *Mar.* the Husband dyed inteſtate, and adminiſtration was committed to the wife, which tooke another husband, and the ſecond husband and his wife as Adminiſtrators brought an action of Debt, hanging which ſuit, the Sonne of the inteſtate, by fraud and covin between him and a Debtor, obtained other letters of Adminiſtration to him and the woman joyntly, and after judgement, the ſonne by covin to defeat the execution releaſed to the Debtor all demands and executions, and after the Husband and Wife ſued execution, and the Debtor upon this releaſe brought an *audita querela*, and adjudged againſt him, becauſe of covin; but there is a third matter, which makes an end of all, for it is found that Sir *John Pagginton* entred upon *Goodale*, and *Goodale* re-entred, and then the Defendant entring is a Treſpaſſor to the Plaintiff, becauſe no title is found for him to make his entrie lawfull, *Finner*] I thinke no payment ought to be made to the heir in this caſe, no more than it ſhall be where a man is bound by obligation to pay a leſſer ſum to the Obligee, his Heires or Executors; there payment ſhall be to the Executor, and not to the Heir. And I think in this caſe, that the payment ought to be to the Feoffee, for that that he is to have the loſſe, for by 22. *E.* 3. & 15 *E.* 3. if a man have execution by Statute, and grant his eſtate over, if the Conuſor will pay the money, and have the land again, it ſhall be paid to the Grantee, and not to the Conuſee. But I am cleer in opinion, that for another cauſe judgement ought to be given againſt the Defendant, for the words of the condition are, *ſub conditione*, That if Sir *John Pagginton* pay 50. l. to the Heires, Executors, or Adminiſtrators of *W.* That the ſaid Deed of Feoffment, and the ſeizin upon that given, ſhall be void. And I think it is no condition, for livery of ſeiſin may not be void without a re-entry, as 15. *H.* 7. is, but for the matter of the Covin, it ſeems to me that if the Heir may receive the money, that ſhall not prejudice; for if he have right to have the money, who hath any wrong, if he give part of that to another? *Clinch*] The payment of the money to the Heire is good; for when a man departeth with his eſtate, it is in his diſpoſe to annexe what condition he will, and for that when he appointeth to the Heires, Executors, or Adminiſtrators, payment to any of them is good: And he ſaid it was a good condition, and no fraud, for the duty was due to the Heir, but for the laſt matter that is not to be cured; for when one title is found for the Defendant, and it is found that he outed one that had elder poſſeſſion, his entry is torcious. *Popham*] I think the condition is not good; for whenſoever you will have an eſtate of inheritance to ceaſe, you ought to have apt words to make it ceaſe; for an eſtate which beginneth by liverie, may not ceaſe by words, but it is otherwiſe of an eſtate that beginneth by contract without any liverie

Conuſee by Statute grants over his eſtate.

Liverie cannot be void without a reentrie.

Poſſeſſion a good title againſt all which have not a better.

Eſtates beginning by liverie, and otherwiſe.

liverie and seisin; but in the point of fraud I am of opinion with my brother *Gawdy*: For fraud in our law is not favoured, albeit the partie have right, for if he that hath right is of covin with one to disseise him that is in possession, to the iutent that he will recover against him, now this recoverie, albeit he hath right, will doe no good to him, but the last makes all without question, and so judgement was given for the Plaintiff.

Fraudulent recoveries are void, although they be by a good title.

112.

A Lease determinable made good, for the insensibility of words.

SAyer brought an *Eejectione firme* against *Hardy*, and a speciall verdict was found, to wit, that a Lease was made to a widow for 40. yeers, *sub hac tamen conditione, quod si ipsa tam diu sola fuerit, & inhabitabit* in the same house, the woman continued sole all her life, and dwelt all her time in the said house, and dyed within the term, the question was, whether the term be determined or not, and whether the words make a condition or limitation. *Morgan*] It is no condition, and cited *Colthursts case*, but if it were a condition here is no breach alleged, for the death is the Act of God, which no man may resist, and the Act of God may not prejudice any man. *Bromly*] I think the word makes a Limitation, and not a Condition, and he cited the Lord *Barkly's* case. *Gawdie*] If a Lease be made to a feme sole, if she so long live sole, and continue unmarried, now if she dye the Lease is determined, and *per Litl.* If an Abbot make a lease for 40. yeers, if he so long be Abbot, if he after be deposed or dye, the lease is determined] : So is it of a lease made by the Husband, if he so long continue Husband of such a woman; but in this case the words are insensible, and for that it is neither condition nor Limitation, *vide* 3. *E.* 6. *Dyer* 65. & 66. *Popham & Clinch.*] It is neither Condition nor limitation, but if this word (*si*) had been omitted, it would have been a condition; Or if the words (*sub conditione quod*) had been omitted, it would have been a limitation. And if I make a Lease for 40. yeers, if the Lessee dwell upon the thing let, during the term there if the Lesse dye, the Lease is determined, for that the point of limitation goeth to all the term, but if it be a lease for 40. yeers, if the Lessee dwell upon that during his life, there if he dye, the Lease continueth : So they all concluded that the terme yet continueth , *per quod judicium intretur pro quer.*

Differences between conditions and limitations.

113.

Assumpsit in consideration of an Office sold.

IN the case between *Walter* and *Walter* for 20 l. *per annum* to be paid to a Justice of *Wales* for the Office of the Clerk of Fines: For a Justice of *Wales* may by Prescription take notice of Fines of Land lying in certain Shires in *Wales*, and this 20 l. *per annum* was to be payd by the Servant to the Master for the sayd Office, for the Clerks Fee was v. s. iiij. d. of every Fine. The Action for not paying the xx l. was brought, and tried *in comitatu Glouc. ſt.* And therefore Mr. Attorney ſaid it was miſ-tryed, for properly it ought to be tryed in one of the three Shires in *Wales*. *John Walter*] I think the Tryall good; for 30 *Eliz.* there was a Caſe in this Court between *Beveridge* and *Conney*, And the caſe was, that a Leaſe was made in the County of *Northampton*, of lands in the County of *Cambridge*, and the Leſſee was bound by Obligation to pay his rent in the County of *Northampton*, The Defendant pleaded payment in the County of *Cambridge*, and this was found in the County of *Northampton*. *Gawdy*] This is a good Caſe, let us ſee the Record. *Walter*] You ſhall Sir. But the Court ſeemed to incline againſt *Walter*. *Cook* ſaid that in this caſe the Aſſumption is voyd, *per le Statute de* 5 *Ed.* 6. cap. 16. For it is not lawfull to ſell ſuch an Office.

Miſtriall.

Reveridge *against* Conney.

114.

Eſcape. P. 36. *Eliz.*

IN an Action of Debt upon an Eſcape, *Popham*, *Clinch*, and *Gawdy* ſayd, if a Priſoner in Execution eſcape, and the Jaylor make freſh ſuit, and before the re-taking the party bring his Action againſt the Jaylor, now the Jaylor may not re-take the Priſoner, as to be in execution for the Plaintif again, but onely for his own indempnity; but if the party doe not bring his Action, then the Jaylor may re-take his Priſoner, and he ſhall be in Execution again for the Plaintif. For by *Popham*, this Caſe is like to Waſt, the which if it be repaired before the Action brought, the party ſhall not have an Action.

Waſt.

115.

Elegit after Vtlary.

A. *B.* was Utlawed after Judgement, and an *Elegit* was awarded againſt the Defendant, Mr. *Godfrey* prayed a *Superſedeas*, *quia erronice emanavit*, for the party may not have any other manner of Execution but a *Capias*; for a *Fieri fac.* he may not have, for the Queen is intituled to all his goods, and an *Elegit* he may not have, for by the Utlawry, the Queen is intituled to all the profits of his

his Lands. *Gawdy*] It appeares by 21 *Hen.* 7. 7. *a.* That the party Outlawed may make a Feoffment, and so out the King of the Profits; and so it seemeth in this Case. But it is good to be advised. *Feoffment by an outlaw.*

116.

SR. *Henry Jones* Knight, and *I.* his Wife, the Wife being then within age, levied a Fine of the lands of the Wife, and a *precipe. quod reddat* was brought against the Conusee, which vouched the Husband and the Wife, and they appeared in person, and vouched over the common Vouchee, which appeared, and after made default, whereby a Recovery was had, and now the said Wife and her second Husband brought a Writ of Error to reverse the Fine, and another Writ of Error to reverse the Recovery, by reason of the nonage of the woman, and the court was of opinion to reverse the Fine, but they would advise upon the Recovery, for that the said *Henry Jones* Knight, and his Wife, appeared in person and vouched over, and so the Recovery was had against them by their appearance, and not by default, and so it seemeth no Error, and to prove that *Gawdy* cited 1 and 2 *Mar. Dyer* 104. and 6 *H.* 8. 61. *Saver* default 50. Also as this case is it seemeth that by generall entry into warranty, the Error upon the Fine is gone, as where a man hath cause to have a Writ of right, or title to enter for a Condition broken, or any other title to land, and in a *precipe quod reddat* of the same land is vouched, and entreth generally into warranty, by that the condition or other title is gone, but upon examination it was found, that the Recovery was before the Fine, for the Recovery was *Quindena Trin.* and the Fine was *tres Trin.* And so the Recovery doth not give away the Error in the Fine. *Error in fine and remedy.* *Generall warranty destroieth titles and conditions.*

117.

IN Evidence between *Tutball and Smote* the case was such, that a Termor for years granted his Term to *I. S.* upon condition that if the Grantee did not yearly pay x l. to *Q. R.* that the grant should be void & after the Grantor died and made the Grantee his Executor, and whether the Condition be extinguished or not was the question. *Popham* and *Gawdy* said the Condition is extinguished, for it is impossible for the Executor to enter upon himself. *Clinch & Fenner è contra*, for he hath the Term *jure proprio*, and the Condition as Executor, and so he hath them as in severall capacities. *Cook*] It hath been adjudged where a man is indebted and marryeth with the Executor, and the Executor dyes yet this is no *devastavit*, for the Husband hath been charged. *Condition extinguished P. 36 Eliz.* *The debtor marrieth the Executor.*

118.

Administrator of an Administrator. Trin. 36. Eliz.

Richard Thorn, and *Jane* his Wife, as Administratrix of one *I. Gime* brought Debt of xx l. against *I. S.* And alleged that the Testator was Administrator of one *Mary Gime*, which *Mary Gime* lent the money to the now Defendant, and Judgement was given in the Common place against *I. S.* And upon the Writ of Error, Error was assigned, for that that the now Plaintif as Administrator of an Administrator, brought this Action, where the Administration of the first Testatators goods ought newly to have been committed by the Ordinary to the next of Kin, and he to whom the Administration of the goods of the first Administrator is committed, hath nothing to doe with them. And so the Iudgement was Reversed.

119.

Privity determined of both parts.

Humble brought Debt against *Glover* for arrearages of rent, and the case was this, that a man made a lease for term of years, and after granted the Reversion to the Plaintif, and after the Lessee for yeares assigned over his whole estate and interest, and after this assignment rent was behind, and the Grantee of the Reversion brought Debt against the first Lessee for rent due after his estate assigned over, and whether Debt will lye against the Lessee after the assignment, was the question, and the opinion of all the Judges was that no Debt lyeth for the Grantee of the Reversion against the first Lessee after the assignment of his term, for when the privily of the estate is determined of both parts, no Debt lyeth, and so the Plaintif was barred.

120.

Maintenance.

IN Evidence between *Maidston* and *Hall*, *Popham* said, that it was agreed in the Star Chamber, if two are at issue in any Action, It is not lawfull for any stranger to labour the Jury to appear, for, for such an Act one *Gifford* was fined in the Star-Chamber. *Gawdy*] Truly the Law is so, for labouring of Juries is maintenance.

Giffords case.

121.

Estate by Devise.

Dickons brought an action of tresspas against *Marsh*, and a speciall Verdict was found that *R. D.* being seised of certain lands in Fee had Issue three children, to wit *John*, *Toby*, and *Mary*, and by his Will devised, that after his debts paid he giveth all his goods lands and moveables unto his three children equally between them

Altam]

Altam] There are two matters to be considered in the case, the first is what estate the children have by this devise, whether Fee simple, or but for life; the second is whether Joyntenants, or Tenants in common; and as to the first point I think they have but an estate for life, for it appeares 22 *H.* 6. 16. If I devise land to one without expressing what estate he shall have, he is but Tenant for life, but if it be expressed in the devise, that the Devisee shall pay 20. *s.* to *John S.* there, as the book is 24 *H.*8. *R.* 125. the Devisee shall have Fee simple. For the second point he said they were Joyntenants and not Tenants in common, but if the wordes of the Will had been, that they shall have part and part alike, there they are Tenants in common, and not Joyntenants. *Tanfield è contra*] For if they were Joyntenants for life, and the reversion descend to one of them, that will never drown the estate for life for the benefit of the Survivor. And if a man give land to two men for their lives, the Remainder to the right heires of one of them, yet they are Joyntenants, and the Survivor shall hold place, and albeit the words are equally between them, yet this shallbe intended equally during their estate, and it hath been taken for a difference, if I devise my land to two equally divided between them, there they are immediately Tenants in commmon, and not Joyntenants, but if the words had been equally to be divided between them, there they are Joyntenants untill division be made, for that that it is referred to a future time. *Gawdy* Justice] I think they have but estates for life, for consideration of blood is not so effectuall as consideration of money; for if I bargain and sell my land for money, without expressing any estate, the Bargaincc hath a Fee simple, but if in consideration of naturall affection, I covenant to stand seised to the use of my son, and do not express any estate, there my son is but Tenant for life; and for the second point I think they are Tenants in commo,n and not Joyntenants, for the case is no other, but as if he had said I give my land to my children by moities amongst them, and then there had been no question but that they had been Tenants in common. *Popham & Clinch*] For the first point no estate but for life passeth, if any estate pass, for it is doubtfull if any estate pass or not, for the Will is, that after his debts paid, he giveth all his lands, goods and moveables, *&c.* And therefore *Popham* thought that such Lands which were liable to Debts should pass, and no other. For if the Devisor had had a Term, then it seemeth no Land should pass: But admit the Land do pass, then if I devise Land to two, equally divided between them, they are Tenants in Common; But if I devise Land to two, equally to be divided between them, by *I. S.* now untill Division, they are Joyntenants; So I think where the Devise is equally to be divided between them, that they are Joyntenants *quousque* Division, because of the reference future.

Dyer 23 *Eliz.* 371. *No estate expressed.* *Consideration.* *Part and part like.* *Reversion descendeth to a Joyntenant.* *Blood, Money, Difference.* *By moities.* *Only Lands lyable.* *A Term.*

John

142.

Deviſe is a demiſe. Hil. 36 Eliz. rot. 376.

John Cole made a Leaſe for years to one *Taunton*, upon Condition, that if the Leſſee ſhall demiſe the Premiſes, or any part of it, other than for a year, to any perſon or perſons, then the Leſſor and his Heirs may re-enter, the Leſſee after deviſed it by his Will to his ſon. *Popham Gawdy & Fenner*] It is a breach of the Condition, and the caſe of 31 *Hen.* 8 45. ruleth the Law in this caſe, for a Deviſe is taken for a breach of the Condition, v. 27 *Hen.* 8. 10. *Quare* if he might not have ſuffered it to come to his ſon as Executor.

123.

Grant before property veſted.

A Man ſeiſed of a Wood, granted to another a Hundred Cords of Wood to be taken by Aſſignment of the Grantor, and before Aſſignment the Grantee granted that over, and whether this Grant be good or not, being before Election, was the queſtion. And the better opinion was, that it is not grantable over, for no property was Veſted in him before the Aſſignment; and if the Grantor die before Aſſignment, the Grant is void, and his Executors if he die ſhall not have it.

124.

A Jurors name in the diſtringing miſtaken.

Brewſter brought Error againſt *Bewty* upon a Judgement given in the Common place in a Replevin, and it was Aſſigned for Error, for that that *Kidman* was retorned in the *Venire fac.* and *Bidman* was retorned in the *Diſtringas & habeas corpora. Tanfield* ſaid, it was apparent Error, and to prove that he cited *Parkers* caſe, where in an appeal *Palus* was retorned in the *Venire fac.* and *Paulus* was in the *Habeas corpora*, and *Paulus* was ſworn, and therefore Error. And between *Cobb* and *Paſton*, a Juror was named *Hanſtrong* in the *Venire fac.* and *Hartſtrong* in the *Diſtr.* and adjudged ill. *Cook* ſaid, that it might not be amended. And to prove that he cited 9 *Edw.* 4. 14. & 27 *Hen.* 65. where it is ſaid, no Amendment after Judgement; for thereby the Attaint of the party ſhall be tolled; and in a caſe between *Crosby* and *Wilbet*, *George Thompſon* was retorned in the *Venire fac.* and *Gregory Thomſon* was in the *Diſtr.* and could not be amended after Judgement. *Gawdy*] It is hard to amend the *Diſtr.* for the Book of 27. *Hen.* 6. is, that it ſhall not be amended, for the *Diſtr.* is the Awarding of the Court, and for that he cited 14 *Hen.* 6. 39. where a Juror was retorned by the name of *Hodd*, and in the *Habeas Corpora* was named *Lord*, and when the default was eſpied, they awarded a new *Habeas Corpora.* But in the Book of 22. *Hen.* 6. 12. the Sherifs

Sheriffs retorn was amended, but not the Writ. And 34 *Hen.* 6. 20. The Prior of St. *Bartholomews* caſe, where in the *Fenire fac.* there were 24 retorned, and in the *Habeas Corpora* but 23. and ſo a Juror omited, and holden that it could not be amended. But after the opinion of the Juſtices of England was, that it ſhould be amended, inſomuch that it appears by examination the ſame party in the *Venire* was ſworn, and ſo no damages to any.

125.

Devise to execute.

Annell brought Treſpaſs againſt *Fenn*, And the caſe was ſuch, that a man was Poſſeſſed of a Term, and made *M.* his Wife and *G. Fenn* his Executors, and deviſed all his Term to them, and that they ſhall have the Term untill all his Debts and Legacies were paid, and all ſuch charges in ſuit of Law as they ſhould expend, the Remainder to *John Fenn* in tail; the queſtion was, whether the Executors take as Deviſees or as Executors. *Gawdy* ſaid, if they take as Deviſees, then if the one of them grant all the Term, no more but the Moity paſſeth, and then the Grantee and the other Executors ſhall be Tenants in Common: But if they take as Executors, then when one Granteth the Term, all paſſeth, as 29 *Hen.* 8. is, *Clinch & Fenner* ſaid, they ſhall take as Executors, for it is the proper function of an Executor to entermedle with the Will. [*Gawdy*] If I make two my Executors, and deviſe the profits of my Land to them untill my Debts and Legacies be paid, and untill they have levyed 100. l. after that to their own uſe, I ſay they ſhall take that as Legatees, and not as Executors, in reſpect of the 100. l. which they are to have to their proper uſe.

Proper benefit.

126.

Second deliverance.

Note, if a man have Judgement to have Retorn upon a Nonſuit in a Replevin, and the Plaintif bring a ſecond Deliverance, this is a Superſedeas of the Retorn; yet the Defendant in the firſt Replevin ſhall have a Writ to enquire of the damages, which ſhall not be ſtaid by the ſecond Deliverance, but if he have Iudgement in the ſecond Deliverance, then ſhall be retorn Irrepleviſable, and ſhall recover damages.

127.

Thoughts are not to be uttered.

STitch againſt *Wiſdom*, an Action upon the caſe was brought for words (*viz*) he did better than many an honeſt man did: For there is many a truer and honeſter man hang'd, and there was a Robery committed, whereof I think him to be one, and I verily think him to be an Horſe-ſtealer, and upon *non Cul.* pleaded, It was found for the Plaintif, and pleaded in arreſt of Judgement, for that it is not expreſly affirmed that the Plaintif was one of the Robbers, neither that he was a Horſe-ſtealer preciſely, but that he thought him to be one, and thought is free for every man, and no ſlander; but this notwithſtanding Judgement was given for the Plaintif, for thoughts tending to ſlander may not be uttered.

128.

Felony.

NOta *per Gawdy*, That a man may be acceſſary to the ſtealing of his own goods, As if he confederate with an other to ſteal goods from his Bayly, to the intent to charge his Baily, this is Felony.

129.

Nomine pœne againſt an Aſſignee. Trin. 36. E. rot. 842.

THynn brought Debt againſt *Cholmley* for 300. l. Arrerages of a *nomine pœnæ*, And declared of a Leaſe for years made by him to one *Ager* rendring Rent, and if default of payment be made of the ſaid Rent at any day, in which it ought to be paid, *Quod tunc & toties* the ſaid *Ager* his Executors and Aſſignes, ſhall pay iij. ſ. iiij. d. *pro quolibet die donec prædictus reddit.* ſo behind ſhall be ſatisfied, And ſhewed how the Rent was behind and not paid by the ſpace of two years, but did not ſhew that he demanded the Rent. *Jackſon*] The ſum demanded is by computation more than ſhould be true: But it ſeems that the Plaintif intends to have every iij. ſ. iiij. d. doubled for every day that the Rent is behind; And if that be his intent, then he demands too little, for in 2 years that will be infinite. *Gawdy*] He ſhall have but iij. ſ. iiij. d. for every day. *Fenner*] I think that he ought to make a demand of the Rent; Or otherwiſe he ſhall not have the *nomine pœnæ*. *Gawdy*] Nay truly, no more than in Debt upon an Obligation, and he cited 21 *Hen.* 6 21. *Edw.* 4. & 22. *Edw.* 4. *Fenner*] Not like, for in debt upon an Obligation it is a duty, but otherwiſe of Rent; and it was agreed that it lies againſt the Aſſigne in this caſe.

Demand.

Harbin

130.

HArbin againſt Barton. The caſe was, that two Jointenants for life, the one made a Leaſe for 80 years, to begin after his death, and after died. And whether the Leaſe is good againſt the Survivor or not, is the queſtion. *Gawdy* ſaid that the Leaſe was good, and cited 2 *Eliz.* 187. *Popham & Fenner è contra.*] After, this Leaſe was adjudged a good Leaſe by all the Judges of *England*; for every Jointenant hath intereſt during his life, and the life of his companion. For it was *Ewdalls* and *Paramores* caſe, 31. *Eliz.* Where a Leaſe was made to the Father during his life, and the life of two of his Sons; The Father aſſigned over, and adjudged to continue after the death of the Father. The like between *Gutter & Locrofts*, and between *Orwin* and others.

A Jointenants Leaſe to begin after his death.

Ewdalls caſe.

131.

Baddock againſt *Ja. S.* and declared in an Action upon the caſe for words, *quod in præſentia diverſorum leigiorum dixit de præfat. quer. hæc verba Anglicana* (*viz.*) Thy Father (*prædictum quer. innuendo*) is a thief; for he ſtole my ſheep. The Defendant juſtified the words, and at the Aſſiſes it was found for the Plaintif, and exception was taken in arreſt of Judgement; For that it is not ſhewed in the Declaration, that the words were ſpoken to the ſon of the Plaintif. *Gawdy*] I think it is good, for that the Defendant hath Juſtified the words ſpoken of the Plaintif, *tota Cur. è contra.* But if the Declaration be uncertain in form, yet the bar may make it good: But if the Declaration want ſubſtance, as in this caſe it doth, there the bar cannot make it good.

Inſufficient declar. for words.

Subſtance, Form in a Declaration.

132.

Robert *Sharples* and *Grace* his Wife, brought Debt upon an Obligation againſt *N. Hankinſon*, the Obligation boar date xiij. *die Octobris, An.* xxxj. *Eliz.* The Condition was, if *N. H.* did pay viij. l. of lawfull money, *&c.* in the year of our Lord God 1599. At or upon the 13th day of *October*, which ſhall next enſue the date herof. The Defendant pleaded that the day of payment was not come. *Gawdy*] I think the day of payment is the 13th day of *October*, next after the date of the Obligation, And that theſe words in the year of our Lord God 1599. are meerly void. *Fenner* Juſtice] I think that the payment ſhall be in the year of our Lord 1599. For when a certainty appears, allbeit afterwards an incertainty come, yet that ſhall

Debt.

ſhall not hurt the certainty, but the firſt certainty ſhall ſtand, and the incertainty ſhall be void, And in this caſe the *An. Do.* 1599. is ſufficient certainty, and therfore the ſubſequent words are void. *Popham*] I think that the payment ſhall be the 13 day of *October prox. poſt An. Dom.* 1599. For the words are, that the Obliger ſhall pay viij. l. of lawfull money of *England* in the year of our Lord God 1599. And if the payment ſhall be before this time, none may know but by the ſpirit of Prophecie, what money ſhall be current in *England* that year before the year come, and it is impoſſible to pay that before; and if I am bound to enfeoff before *Eaſter*, him that comes firſt to Pauls upon *Michaelmas* day next, this is void, becauſe it is impoſſible.

Impoſſible condition void.

133.

Teſte of the Venire miſtaken.

Boyer brings a Writ of Error againſt *Jenkings*, and the Error aſſigned was, for that the ſuit was commenced 35 *Eliz.* And the *Venire fac.* to try this iſſue bore, *Teſtte* 33 *Eliz. Gawdie*] a *Venire fac.* which bears *Teſtte* 33 *Eliz.* cannot poſſible be to try an iſſue in 35 *Eliz.* which is two years after, and therefore here is no *venire fac.* and ſo holpen by the Statute of 18 *Eliz.* after Verdict. *Tanfield*] This very caſe was *Yorks* caſe, adjudged in this Court that it was not holpen by the Statute.

134.

Diſtinct grants.

Nota per Cook Attorney Generall, that the Lord Keeper that is, was of Counſell in a caſe *inter Harlakenden*, and *A.* where it was adjudged, that if a man make a Leſſe for years of Land, excepting the Wood, and after the Leaſor grants the Trees to the Leſſee, and the Leſſee aſſigned over the Land to another, not making any mention of the Trees, now the Trees ſhall not paſs to the Aſſignee, as annexed to the Land, for the trees and Land are not conjoined, for the Leſſee had ſeverall intereſts in them by ſeverall Grants.

135.

Ejectment.

Thomas againſt *King*, and the Title of the Land was between Sir *Hugh Portman* and *Morgan*, And the Ejectment was ſuppoſed to be of 100. Acres of Land in *Dale* & *Sale*, and the Jury found the Defendant guilty of 10 Acres, but did not ſhew in what Town they lay, whereupon *Haris* Serjeant moved in arreſt of Judgement, for that it doth not appear where the Sherif may put the Plaintif in Poſſeſſion. *Et non allocatur*, for the party at his perill ought to ſhew unto the Sherif

Plaintiff the right land, for which Judgement was given for the Plaintif.

126.

Land againſt *Bardwick*, and the caſe was this, that a woman being poſſeſſed of Coppihold land for her Widowes eſtate, ſowed the land, and after took the Plaintif to Husband, and the Defendant being Lord of the Mannor entred and took the Corn, and the Husband brought an action of Treſpaſs. *Clinch*] I think, the Woman ſhall not have the corn, but if the Wife had Leaſed the Land, and the Leſſee had ſown it, and after the Wife had maried, and the Lord had entred, yet the Leſſee ſhall have the Corn. But in the caſe at bar, the Woman her ſelf is the cauſe of the Determination of her eſtate, for ſhe committeth the Act, and therefore ſhall not have the Corn, no more, than if Leſſee for life ſow the Land, and after commit forfeiture, and the Leſſor enter, in this caſe the Leſſor ſhall have the Corn. *Fenner*] At the firſt the State of the Woman was certain, *viz.* for her life, but yet determinable by Limitation if ſhe mary. And if a man which hath an Eſtate determinable by Limitation ſow the ground, and before ſeverance the Limitation endeth the ſtate, yet the party ſhall have the Corn which he hath ſown. And in the caſe at the bar, there is no Forfeiture committed which gives courſe of Entry, nor no diſhinheritance or wrong made to the Lord, as in the caſe where Tenant for life after his ſowing commits forfeiture; and if a man enter for breach of a Condition, he ſhall have the Corn, and not he that ſowed the ſame, for that his entry over-reacheth the ſtate of the other; but in this caſe the entry of the Lord doth not over-reach the Title of the Woman; for he ſhall take that from the time that the Limitation endeth the Eſtate, and not by any relation before, For the Act of the Woman is Lawfull, and therefore no reaſon he ſhall loſe the Corn. *Popham* Chief Juſtice] It is cleare, if Tenant for life ſow and after commit a Forfeiture. And the Leſſor enter, he ſhall have the Corne; the like is it if the Leſſee after the ſowing ſurrender his Term the Leſſor, or he to whom the Surrender was made, ſhall have the corn; but if Tenant for life make a leaſe for yeares, and after commit a Forfeiture, and the Leſſor enter, now the Leſſee ſhall have the Corn; and in the caſe at bar, if the woman had Leaſed for yeares, and the Leſſee had ſowed the land, and after ſhe had taken Husband, now the Leſſee and not the Lord ſhall have the corn, for the act of the Woman ſhall not prejudice a third perſon, but when ſhe her ſelf is the party, and hath knowledge at the time of the ſowing what acts will determine her eſtate, then is it reaſon if ſhe by her

Forfeiture of a particular tenant.

Leaſe by Tenant for life.

Forfeiture.

Entry for condition broken.

Forfeiture.

Surrender.

Leaſe by Tenant for life.

Knowledge.

own act will determine her estate, that she shall lose the Corn: For if Lessee for life sow the land, and after pray in aid of a Stranger, now if the Lessor enter he shall have the Corn, And so if Tenant at Will sow the Land, and after determine his own Will, the Lessor shall have the Corn, but otherwise it is if the state be determined by the act of law, or of a third person, so that no folly was in him that sowed. *Fenner*] If the Husband and Wife were Lessees during the coverture, and after the Husband sowes the land, and then the Husband and Wife are divorced, yet the Husband shall have the Corn, for that the Husband at the time of the sowing had no knowledge of the Act which determined his interest. So in this case the Woman at the time of the sowing did not know of the future Act which determined her interest, and therefore no reason she should lose the Corn, for the Corn is a Chattell in her; for if she had either granted them, or been outlawed after the sowing, and then had taken a Husband, Now the Queen in the case of the outlary, or the Grantee in the other case, and not the Lessor, shall have the Corn. *Popham*] I will agree the case of the divorce to be good Law: For that is not meerly the Act of the party, but allso of the Court; but in the case at bar, the taking of the Husband is the Voluntary Act of the Woman *per que*. And after Judgement was given against the Husband, which was the Plaintif.

Lesseepraies in aid.
Tenant at will determines his own Will.
Determination by the act of the Law of a third person.
Divorce.
Grant.
Outlary.

137.

Statute Merchant.

A *Scough* brought a Writ of Error against *Hollingworth* upon a Judgement given in the Common place in a Writ of Debt brought upon a Statute Merchant, And the case was that *Ascough* came before the Maior of *Lincoln*, and put his seal to the same Statute, and the Kings seal was also put thereunto, but one part did not remain with the Maior, according to the Statute of *Acton Burnell*, And it was adiudged a good Obligation against the Partie, albeit it is no Statute. *Godfrey*] I think the Judgement ought to be affirmed, and he cited 20. *E.* 3. accompt 79. And it is clear that a thing may be void to one intent, and good to another, by 10. *Eliz.* but *Popham* and *Fenner* were of opinion, that it was hard to make it an Obligation, for in every contract, the intent of the parties is to be respected. And here the intent of the parties war, to make it a Statute, for the Kings seal is put to it, and a Statute needs no deliverie, but an Obligation ought to be delivered, otherwise it is not good, and being void as a Statute, it is void in all; And after Judgement was given, That the first Judgement shall be eversed if other matter be not shewed.

Intent in every contract.
Delivery.

Bodyam

128.

BOdyam againſt *Smith* in Treſpas for the taking of an Ox in *Dale*. The Defendant juſtified the taking in *Blackacre*, and that it was his Freehold, for damage feaſant. The Plaintif made a new aſſignment, That the place whereof he hath complained the taking to be is *Green-acre* in *Dale*, and the Defendant juſtified there for *Herriot* ſervice. *Gawdy*] I think the Lord may ſeiſe *Heriot* ſervice, and when the Lord hath ſeiſed that is a ſeiſin by the hands of his Tenant, *Plowd. fo.* 45. And for the laſt point, there is not any colour or queſtion, for when in treſpaſſe the Defendant pleads a plea in bar, and then the Plaintiff makes a new Aſſignment, reaſon will that now the Defendant ſhall have anſwer to this new aſſigned wrong for *per* 27. *H.* 8. 7. after a new aſſignment, the old barre is waved, and out of the book, and the Defendant ſhall plead to the new aſſignment, as if he had never pleaded before. *Popham, Fenner & Clinch concordaverunt cum Gawdy.*

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Heriot ſervice may be ſeiſed.

Seaſure makes a ſeiſin

New aſſignment.

139.

BAſtard a good name of purchaſe, for it is a ſufficient denomination who ſhall take, *per Popham & Fenner.*

Baſtard.

140.

GAwdy Juſtice ſaid a man cannot be perjured by an *innuend.* *Popham* ſaid, that no man is to be touched for a perjurie upon the Statute of 5. *Eliz.* if he be not depoſed upon ſome matter depending in ſuit, in ſome Court of Record, and if he be perjured in circumſtance, and not in the point in queſtion, that is not materiall, and is not puniſhable by the Statute of 5. As if a man doe ſwear, that he ſaw ſuch a man ſteal, and deliver ſuch a deed, and when he did it, he was in blew coat, where indeed he was not in a blew coato.

Perjury.

Popham

141.

Popham Chief Justice said, there will be a difference between disjunctive absolute, and disjunctive contingent, as if a man be bound to pay ten pound, or to enfeoff one upon the returne of *I. S.* from *Rome*; there if *I. S.* dye before he return from *Rome*, then the obligation is saved, although the ten pound be never payed: but if it be a voluntarie Act, as to pay you ten pound, or to enfeoff you before *Michaelmas*, there if the Obligor dye before *Mic.* yet his Executors ought to pay the money.

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